United Nations A/73/361

General Assembly

General
ember 2018

Original: English

**Seventy-third session**
Item 74 (b) of the provisional agenda*
**Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms**

# Promotion and protection of human rights and fundamental freedoms while countering terrorism

## Note by the Secretary-General**

The Secretary-General has the honour to transmit to the General Assembly the report of the Special Rapporteur of the Human Rights Council on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Fionnuala Ní Aoláin, submitted in accordance with Assembly resolution 72/180 and Human Rights Council resolution 31/3.

* A/73/150.

** The present report was submitted after the deadline in order to reflect the most recent developments.

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# Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism

*Summary*

The present report is the second annual report submitted to the General Assembly by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism since her appointment in August 2017. A brief introduction (sect. I) is followed by a description of the activities of the Special Rapporteur during the reporting period (sect. II). The report broadly addresses the effects of thematic Security Council resolutions concerning terrorism on the promotion and protection of human rights since the events of 11 September 2001. The Special Rapporteur reflects on the important regulatory and gap-filling role played by the Security Council in respect of peace and security (sect. III) in the field of counter-terrorism, including terrorist financing and cooperation between States. The Special Rapporteur addresses new regulatory elements in counter-terrorism regulation, as evidenced in the resolutions adopted by the Council since 11 September 2001, and their broad impact on State practice, implementation and sovereignty (sect. IV). The particular effects of the resolutions on human rights protections are outlined (sect. V), and the parallel effects on the promotion and protection of international humanitarian law are also briefly described (sect. VI). The report contains a number of concrete recommendations made by the Special Rapporteur to enable best practices on human rights and international humanitarian law compliance in the context of counter-terrorism regulation applicable to the adoption and implementation of Security Council resolutions Furthermore, the Special Rapporteur affirms the essential role of the Council in maintaining peace and security, as set out in the Charter of the United Nations and informed by the essential and profound commitment to human rights as the bedrock of international institutional practice contained therein. The Special Rapporteur also affirms the important complementary role of the General Assembly in the field of counter-terrorism and encourages the Assembly to use its capacities to the full to ensure that human rights remain an enforced and indispensable element in regulating the challenge of terrorism and addressing the conditions conducive to terrorism.

# I. Introduction

1. The present report, the second report submitted to the General Assembly by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism since her appointment in August 2017, is submitted pursuant to General Assembly resolution 72/180 and Human Rights Council resolution 31/3. The report analyses the impact on the protection and promotion of human rights and, inter alia, international humanitarian law following the adoption of multiple resolutions regulating terrorism by the Security Council in the period after 11 September 2001.

2. A report on the work undertaken by the Special Rapporteur since her last report to the General Assembly (A/72/495) is provided below.

# II. Activities of the Special Rapporteur

3. The Special Rapporteur has had a fruitful year advancing positive and sustained dialogue with States concerning the protection and promotion of human rights. The Special Rapporteur is pleased to have received invitations from Australia, Belgium, Bosnia and Herzegovina, France, Kazakhstan, Kenya, Mali, Tajikistan, Uganda and the United States of America to conduct country visits. Country reports have been issued in respect of Tunisia, Saudi Arabia and Sri Lanka, completing the mandate commitments of the previous Special Rapporteur, Ben Emmerson. Country visits were undertaken to Belgium and France in May 2018, and the Special Rapporteur notes the productive, collegial, and highly engaged character of those visits and the openness of both Governments to dialogue. Two additional country visits are pending, one to Qatar, in October 2018, and the other to Kazakhstan, in May 2019.

4. The Special Rapporteur presented her thematic report on the human rights challenge of states of emergency in the context of countering terrorism (A/HRC/37/52) to the Human Rights Council in March 2018. In that report, she urged States to ensure that any resort to the use of counter-terrorism regulation, including the declaration of emergencies, was commensurate with State obligations, specifically identifying the high cross-over between the use of counter-terrorism regulation and the resurgence of de facto states of emergency. States were: reminded of their obligations of proclamation, notification and derogation; encouraged to make better use of ordinary law to address legal challenges; reminded of the high rate of overlap between de facto and permanent states of emergency, with sustained and serious human rights violations; and urged to institute independent oversight of counter-terrorism legislation and administrative practice to ensure that counter-terrorism measures were not seriously detrimental to human rights obligations.

5. The Special Rapporteur, as one of 38 member entities of the Counter-Terrorism Implementation Task Force within the United Nations counter-terrorism architecture, has made working within the United Nations structure itself a high priority.[1] She is deeply committed to the "all of United Nations" approach to countering terrorism, with human rights as an essential pillar of that approach, as affirmed in the United Nations Global Counter-Terrorism Strategy.[2] The Special Rapporteur is an active participant in multiple thematic working groups of the Counter-Terrorism Implementation Task Force (including the working groups on victims of terrorism; a gender-sensitive approach to preventing and countering terrorism; promoting and protecting human rights and the rule of law while countering terrorism; foreign

[1] See www.un.org/counterterrorism/ctitf/en/structure.

[2] Resolution 60/288.

terrorist fighters; and national and regional counter-terrorism strategies) and has contributed substantively to a number of research and policy projects emanating from the working groups.[3] With a strong and supportive relationship with the Office of Counter-Terrorism, the Special Rapporteur is one of the signatories to the Global Counter-Terrorism Coordination Compact, and was fully engaged with the Office in its drafting and agreement.[4] The Special Rapporteur also participated in the High-level Conference of Heads of Counter-Terrorism Agencies of Member States convened by the Secretary-General in June 2018, and addressed the gathering on the importance of integrating human rights into the coordination of intelligence gathering and intelligence sharing activities.

6. The Special Rapporteur has engaged extensively in the activities of non-governmental organizations, human rights defenders and civil society organizations throughout the past year. Meetings have been held, inter alia, at Chatham House (London), the Center for Strategic and International Studies (Washington, D.C.) and the Palais des Nations (Geneva), and extensive civil society consultations have taken place during country visits to Belgium and France. The Special Rapporteur highlights ongoing work with non-governmental organizations to ensure greater access to and transparency from the United Nations counter-terrorism architecture for such organizations and human rights defenders. The Special Rapporteur emphasizes her commitment to integrating gender by including organizations working on issues related to women's rights into counter-terrorism focused meetings held under the auspices of her mandate.

7. The Special Rapporteur has contributed to a number of national debates concerning national security/terrorism legislation by offering expert views on draft legislation, including in Australia, in February 2018, and in the United Kingdom of Great Britain and Northern Ireland, in July 2018. The Special Rapporteur has issued multiple communications concerning the use of national security/terrorism legislation against civil society activists in multiple countries. She warns about the ongoing misuse of counter-terrorism law and administrative practice to quell legitimate dissent and limit freedom of expression. The Special Rapporteur has had ongoing and constructive engagement with the Financial Action Task Force, the Office of the European Union Counter-Terrorism Coordinator and the United Nations Counter-Terrorism Executive Directorate.

## III. Charter of the United Nations and the role of the Security Council in regulating terrorism

8. The legal regulation of terrorism has posed significant challenges to the global legal order for many decades. States have responded at the domestic, regional and international levels through multiple legal and political avenues.[5] The Security Council has been reasonably active on counter-terrorism issues, but, historically, relevant resolutions were specifically linked to particular situations,[6] with one

[3] See Office of Counter-Terrorism, Counter-Terrorism Committee Executive Directorate and International Criminal Police Organization, *The Protection of Critical Infrastructure against Terrorist Attacks: Compendium of Good Practices* (2018).

[4] See www.un.org/en/counterterrorism/hlc/un-global-compact.shtmlA/72/840, annex III.

[5] Oversight of such activities is undertaken, inter alia, by human rights courts: see, for example, Ana Salinas de Frias, *Counter-Terrorism and Human Rights in the Case Law of the European Court of Human Rights* (Council of Europe Publishing, 2013).

[6] See, for example, Security Council resolutions 748 (1992) on Libya (1992), 1054 (1996) and 1070 (1996) on the Sudan and 1267 (1999) on Afghanistan.

exception.[7] Notably, prior to 11 September 2001, there were no resolutions adopted under Chapter VII of the Charter of the United Nations that imposed a legal duty on States to introduce specific kinds of domestic counter-terrorism legislation.

9. Internationally, multilateral regulation of terrorism until the attacks of 11 September 2001 was primarily carried out through treaties. These suppression treaties, which focused on responding to certain threats or actions, ranged from agreements that were sweeping in scope to those with more specific aims. These treaties illustrate the capacity of States to adopt a quasi-legislative model in response to terrorism, with the multilateral engagement of multiple States. Some of the earliest agreements include: (a) the Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo Convention) of 1963;[8] (b) the Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Convention) (1970);[9] (c) the International Convention on the Taking of Hostages (Hostages Convention) of 1979;[10] (d) the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 1971;[11] and (e) the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, of 1973.[12] These treaties constitute an important reservoir of multilateral agreement on the scope of terrorist acts, and the specific agreed obligations of States to act. Until the present time, agreement on the draft comprehensive convention on international terrorism, including the definition of terrorism contained therein, has been elusive,[13] with the Sixth Committee of the General Assembly remaining constrained by a lack of State consensus. The lack of agreement in the Sixth Committee should not, however, be understood as evidence of no agreement between States regarding the scope of their obligations and capacities in regulating terrorism. The lack of one broad treaty should not distract from the substantial agreement among States and the breadth and scope of legal regulation. Critically, negotiations on an expansive multilateral terrorism treaty have enabled agreement on specific aspects of global counter-terrorism regulation in important but largely underacknowledged ways.

10. While treaty-making was dominant in the regulation of terrorism before 11 September 2001, and remains important today,[14] it has, in the Special Rapporteur's view, been overtaken by the assertive role taken by the Security Council in regulating State responses to terrorism through the adoption of resolutions.[15] This shift in regulatory approach is complemented by the increased role of some regional regulatory processes,[16] in tandem with the establishment of specialized regulatory entities to address specific aspects of State practice as it intersects with counter-

[7] Unusually, Security Council resolution 1269 (1999), para. 1, does not refer to a situation in any particular country, but rather "Unequivocally condemns all acts, methods and practices of terrorism as criminal and unjustifiable, regardless of their motivation, in all their forms and manifestations, wherever and by whomever committed, in particular those which could threaten international peace and security".

[8] United Nations, *Treaty Series*, vol. 704, No. 10106.

[9] United Nations, *Treaty Series*, vol. 860, No. 12325.

[10] Resolution 34/146, annex.

[11] United Nations, *Treaty Series*, vol. 974, No. 14118.

[12] United Nations, *Treaty Series*, vol. 1035, No. 15410.

[13] Danja Blöcher, "Terrorism as an international crime: the definitional problem", *Eyes on the ICC*, vol. 8, No. 1 (2011), pp. 107 and 113.

[14] For example, Protocol to Amend the Convention on Offences and Certain Acts Committed on Board Aircraft, 2014.

[15] Paul C. Szasz, "The Security Council starts legislating", *American Journal of International Law*, vol. 96, No. 4 (October 2002), p. 901.

[16] For example, see Council of Europe Convention on the Prevention of Terrorism, adopted in 2005, and its Additional Protocol, adopted in 2015; European Union Directive 2017/541 of the European Parliament and the Council of March 2017 on combating terrorism, replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA.

terrorism.[17] These combined shifts have had, in the opinion of the Special Rapporteur, a distinctly negative effect on the overall advancement of meaningful protection for human rights within the counter-terrorism sphere. Moreover, the Special Rapporteur articulates her grave concern that the well-entrenched constitutional and domestic protections for human rights embedded in national legal systems in many countries are being rendered irrelevant or powerless in the new regulatory landscape. Taking a macro view of Security Council resolutions, it appears that they have broadly urged, and sometimes required, States to implement sanctions regimes and counter-terrorism measures (this matter is discussed in greater depth in section IV.B below). It is the scope and the effect of those regimes and measures that is of concern in the present report, and it is with the process and procedures of this shift, and its effect on human rights protections, that the report is engaged. The report affirms the value of multilateral and reciprocal State engagement in regulating terrorism while concurrently ensuring the effective protection of human rights.

11. The Special Rapporteur recalls that in Article 24 (1), the Charter ascribes to the Security Council the "primary responsibility for the maintenance of international peace and security", and it is granted an impressive array of powers under Chapters VI and VII of the Charter.[18] In parallel, under Article 10, the General Assembly has express competence to make recommendations to the Council and Member States on "any questions or any matters" within the scope of the Charter", affirming its separate competence in peace and security matters. The Charter also expressly recognizes human rights as foundational to its purposes and principles. Article 1 of the Charter, setting out the purposes of the United Nations, affirms the promotion and encouragement of "respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion". This affirmation is specifically defined in Article 55 of the Charter, which connects conditions of stability and well-being enabling peaceful and friendly relations among nations "based on respect for the principle of equal rights and self-determination of peoples", to "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, language, or religion" (Article 55 (c)). The Special Rapporteur notes that such principles of respect and observance of human rights are not merely outward-facing obligations but also inward-facing: they guide the actions of all of the institutions and entities created and regulated by the Charter in the discharge of their powers; and the actions of all United Nations institutions and entities are equally grounded in the requirement to respect and promote human rights in all their actions, complemented by the obligations of customary international law to respect and promote certain fundamental human rights, as founded in the international legal personality of the United Nations.

## IV. Role of the Security Council in the period after 11 September 2001

12. Contextualizing the role and practice of the Security Council after the events of 11 September 2001 requires a brief reflection on the expansion of the Council's role in the aftermath of the Cold War, when a reinvigorated Council regulated forcefully across a broader array of war and peace arenas. A notable change was the Council's practical enlargement of the concept of what posed a "threat to international peace and security". This move, prompted by new challenges to global peace and security, included situations that would have traditionally fallen outside of the understanding

[17] See, for example, www.fatf-gafi.org (Financial Action Task Force) and www.thegctf.org (Global Counter-Terrorism Forum).

[18] Bardo Fassbender, *The United Nations Charter as the Constitution of the International Community* (Leiden, Belgium, Martinus Nijhoff Publishers, 2009).

of the scope of collective action under the Charter.[19] This included situations of non-international armed conflict, gross violations of human rights amounting to crimes against humanity, humanitarian crises, coups d'état and other serious threats to the democratic order of a State. In obvious ways, the broadening of "threats to peace and security" laid the groundwork for the expansion of such threats to include global, regional and national experiences of terrorism. In the decade leading up to the events of 11 September, the Security Council further broadened its role by focusing on issues that pointed beyond any particular conflict or situation,[20] addressing, inter alia, the protection of children (resolutions 1261 (1999), 1265 (1999), 1296 (2000) and 1314 (2000)) and civilians (resolutions 1265 (1999) and 1296 (1999)) in situations of armed conflict, the role of women in the context of peace and security (resolution 1325 (2000)), flows of small arms and light weapons to Africa (resolution 1209 (1998)), HIV/AIDS (resolution 1308 (2000)), as well as international terrorism (resolution 1269 (1999)). However, the Special Rapporteur underscores that, notwithstanding commonalities with the post-Cold War expansion of the competence of the Council, the regulation of terrorism by the Council has unique and specific dimensions. These elements also pose significant challenges to the meaningful protection and promotion of human rights while countering terrorism.

13. Since the tragic and devastating events of 11 September 2001, the Security Council has issued sweeping and important statements of principle on the prevention of terrorism: they are clear, at least in their rhetorical sense, and undeniably enhance the duty of States to prevent and repress terrorism. These developments align with an increasingly important law-making function being carried out by international organizations more broadly, but in particular by the Security Council in the context of counter-terrorism. The Special Rapporteur cautions that such broad law-making has the capacity to impinge on the legitimate sovereignty of States, may override national constitutional and legislative protections for human rights and may operate to exclude broad and sustained debate among States, citizens and civil society concerning ways to safeguard human rights and security in the context of terrorism. The resolutions adopted by the Council are characterized by a number of common elements, including: significant speed in the drafting, debate and agreement of resolutions; a lack of engagement with civil society actors in the determination of legal, political, social and cultural effects of such resolutions; a lack of benchmarking of, or accountability for, human rights and humanitarian law violations that may follow from implementation; and lack of attention to the disproportionately detrimental enjoyment of specific human rights triggered by targeted forms of terrorism regulation. Finally, as noted in the previous report of the Special Rapporteur (A/72/495), because the resolutions lacked an agreed and comprehensive definition of terrorism consistently applied across all regulatory measures, States and regional organizations have been left free to craft their own definitions in implementation, resulting in a wide variety of groups, persons and activities being targeted by counter-terrorism regulation.

## A. Security Council resolution 1373 (2001)

14. Primary among the resolutions adopted in the wake of the events of 11 September 2001 is resolution 1373 (2001). Many commentators have inferred that

[19] One early example is Security Council resolution 688 (1991), in which the Council stated that the consequence of "the repression of the Iraqi civilian population [...] threaten international peace and security in the region".

[20] Susan Lamb, "Legal limits to United Nations Security Council powers", in Guy S. Goodwin-Gill and Stefan Talmon, eds., *The Reality of International Law: Essays in Honour of Ian Brownlie* (Oxford University Press, 1999), p. 361.

the resolution enhanced the counter-terrorism obligations of Member States, which, before the adoption of that resolution, rested upon a "low threshold [of] due-diligence".[21] When examining action by the Council following the events of September 2001, two stages become evident. Immediately after the attacks, the Council passed resolutions 1368 (2001) and 1373 (2001) and expanded the targeted sanctions regime set up under resolution 1267 (1999). Subsequent resolutions in the area of counter-terrorism, including resolution 1390 (2001), built on these two thematic legs until the rise of the Islamic State in Iraq and the Levant (ISIL) caused the Council to pass an extensive set of new measures, in its resolutions 2170 (2014), 2178 (2014) and 2396 (2017), which were deemed necessary for addressing the threat posed by ISIL and the "foreign fighters" phenomenon. This second phase of legislative action by the Council is ongoing, with the Council having passed a record number of thematically diverse terrorism-related resolutions in 2017 (including resolutions 2341 (2017), 2354 (2017), 2368 (2017), 2370 (2017) and 2395 (2017)).

15. Security Council resolution 1368 (2001), adopted on 12 September 2001, condemned the terrorist attacks of 11 September and called upon the members of the international community to "redouble their efforts" to prevent and suppress terrorist acts. On 28 September, the Council adopted resolution 1373 (2001), under Chapter VII of the Charter. Resolution 1373 (2001), one of the most wide-ranging resolutions ever passed by the Council, with an enormous weight of international political consensus behind it, placed mandatory obligations upon States.[22] As noted by a prominent scholar, the resolution manifested unusual legislative character as it mandated compulsory action of a general nature for States, with binding intent. Furthermore, while its adoption was triggered by the attacks of 11 September, the action mandated was not limited to a specific situation or conflict affecting international peace and security, nor did it include any explicit or implicit time limitation.[23] The resolution has been heralded as a historic event,[24] through which the Council took the "unprecedented step"[25] of enacting "legislation for the rest of the international community".[26]

16. Security Council resolution 1373 (2001) required States, among other things, to criminalize terrorist activities, to freeze the financial assets of terrorists and those participating in or facilitating terrorist acts, to ban others from making funds available to terrorists and to deny safe haven to such persons or groups. In the resolution, the Council decided that States should bring terrorists to justice, assist each other with respect to criminal prosecutions of terrorist offenders, institute effective border security measures and exchange information related to movements of terrorist persons or networks and forged or falsified travel documents. The resolution also drew attention to the link between international terrorism and "transnational organized crime, illicit drugs, money-laundering, illegal arms trafficking, and illegal movement of nuclear, chemical, biological and other potentially deadly materials" and stressed the need for international coordination in addressing that challenge. Uniquely, the

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[21] See James Thuo Gathii, *War, Commerce, and International Law* (Oxford University Press, 2010), p. 235.

[22] Wondwossen D. Kassa, "Rethinking the no definition consensus and the would have been binding assumption pertaining to Security Council resolution 1373 (2001)", *Flinders Law Journal*, vol. 17, No. 1 (2015), pp. 127 and 128.

[23] Paul C. Szasz, "The Security Council starts legislating", *American Journal of International Law*, vol. 96, No. 4 (October 2002), pp. 901 and 902.

[24] See S/PV.4413 (12 November 2001), intervention by the representative of the United Kingdom of Great Britain and Northern Ireland.

[25] See S/PV.4950 (22 April 2004), in which the representative of Angola declared that by "adopting resolution 1373 (2001), the Security Council took the unprecedented step of bringing into force legislation binding on all States on the issue of combating terrorism".

[26] See A/56/PV.25 (15 October 2001), intervention by the representative of Costa Rica.

resolution established a new mechanism in the form of the Counter-Terrorism Committee to monitor the implementation of the resolution by Member States. The language used by the Council ("decides that all States shall") indicated that various provisions contained mandatory directions in a style characteristic of legislation, as also confirmed in subsequent resolutions referring to "obligations" established under resolution 1373 (2001) (see Council resolutions 1611 (2005), 1618 (2005), 2133 (2014) and 2178 (2014).

17. Security Council resolution 1373 (2001) and follow-up resolutions placed particular emphasis on suppressing the sources of finance and support for terrorism. Resolution 1373 (2001) imposed binding obligations on States to prohibit and criminalize terrorist financing, prevent and suppress such acts and freeze the funds and assets of those committing or supporting terrorism. These obligations are based on provisions of the International Convention for the Suppression of the Financing of Terrorism.[27] With the Convention adopted in 1999 but not yet in force in September 2001, the Council made certain of its substantive provisions binding on all Member States under Chapter VII of the Charter. Although the Convention was adopted by the General Assembly without a vote, the Council's action nonetheless effectively bypassed domestic processes of ratification of international legal instruments, at least with respect of the provisions reflected in resolution 1373 (2001). It is also notable that the Council chose not to explicitly adopt the definition of terrorist acts from the Convention.

18. The Security Council has reaffirmed these obligations contained in resolution 1373 (2001) and has made further recommendations in subsequent resolutions. Notably, it addressed the issue of "justification or glorification (apology)" and "incitement of terrorist acts motivated by extremism and intolerance" in resolution 1624 (2005), calling upon all States to prohibit incitement to commit a terrorist act and prevent such conduct. Once again, the Council did not provide a definition of relevant terms. The Special Rapporteur notes that the 2005 resolution stressed, for the first time in an operative paragraph, that States "must comply" with their obligations under international law, in particular international human rights law, refugee law and humanitarian law. Specific reference is made to articles 19 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. The Special Rapporteur points out the obvious and lengthy time gap between 2001 and 2005 in the articulation of specific human rights obligations in counter-terrorism regulation by the Council, and she once again recalls the Charter and the human rights provisions contained therein, as well as their inward and outward facing dimensions.

## B. Sanctions resolutions by the Security Council

19. In parallel to the thematic scope of resolution 1373 (2001), in the aftermath of the terrorist attacks of 11 September 2001, the Security Council, in its resolution 1390 (2002), and in subsequent resolutions, bolstered the sanctions regime set up under resolution 1267 (1999) targeting the Taliban leadership in Afghanistan and reframed sanctions as a global, open-ended regime focused on any "individual, group, undertaking, or entity associated with Al-Qaida, Usama bin Laden or the Taliban" not linked to a particular situation or conflict. Council resolution 1617 (2005), enacted under Chapter VII of the Charter, decided "that acts or activities indicating that an individual group, undertaking, or entity is 'associated with' Al-Qaida, Usama bin Laden or the Taliban include participating in the financing, planning, facilitating, preparing, or perpetrating of acts or activities by, in conjunction with, under the name

[27] Resolution 54/109, annex.

of, on behalf of, or in support of; supplying, selling or transferring arms and related materiel to; recruiting for; or otherwise supporting acts or activities of; Al-Qaida, Usama bin Laden or the Taliban, or any cell, affiliate, splinter group or derivative thereof". The addition of "otherwise supporting acts or activities of" broadened the notion, opening the door to expansive definitions of [material] support to terrorism and terrorist acts under domestic law that have at times led to sanctioning or even criminalizing the activities of civil society organizations, humanitarian actors or criminalizing private or family relationships.[28]

20. The sanctions regime has been criticized for infringing upon a series of human rights, including the right to due process and effective remedy, its lack of transparency and lack of safeguards against arbitrary application (see A/65/268 and A/HRC/34/61). While improvements, including the inclusion of humanitarian exemptions, the publication of listing guidelines and narrative summaries of listing rationales, national court reviews, as well as the creation of the Office of the Ombudsperson (as limited to the Da'esh and Al-Qaida list), have mitigated some of these shortcomings, concerns remain. As my predecessor warned, the process remains "unnecessarily opaque" and access to information problematic (A/HRC/34/61, paras. 17–20), including for the Ombudsperson. The previous Ombudsperson expressed concerns about the insufficient transparency in the process and inadequate institutional guarantees of independence granted to the Ombudsperson's office.[29]

21. The Special Rapporteur notes the difficult and lengthy process it took to ameliorate the adverse human rights implications of the sanctions regime, which was set up without prior due consideration of its effects on a broad range of human rights and without any meaningful assessment of the impact, ex post facto, on human rights. The Special Rapporteur observes that sanctions resolutions have far fewer direct references to human rights and humanitarian law obligations than other counter-terrorism resolutions, a matter that is not merely cosmetic but points to an important regulatory difference and contextualization in the case of these resolutions. In the Special Rapporteur's view this distinction is not justified.

## C. Security Council process and counter-terrorism resolutions

22. The Special Rapporteur is distinctly aware that the Security Council does not operate at arm's length from situations threatening peace and security. As the events of 11 September 2001 demonstrated, States and the international community must, at times, mobilize quickly and effectively to combat new threats and address regulatory lacunae that threaten global security. However, Council procedure has, in other contexts, functioned to give broad and meaningful capacity for State engagement, as well as consultation with various actors, including representatives of civil society and experts, to determine and review the likely consequences of the Council's exhortations and requirements.[30] Council resolutions on counter-terrorism measured over a 17-year period manifest a distinct pattern of fast-tracked creation, and a notable absence of broad consultation and engagement. This is compounded by the almost

[28] See Duke Law International Human Rights Clinic and Women Peacemakers Program, *Tightening the Purse Strings: What Countering Terrorism Financing Costs Gender Equality and Security* (2017). Security Council resolution 1373 (2001) has led to States preparing their own terrorist lists. This auto-interpretive approach is arguably more detrimental to human rights than the specific lists adopted by the Security Council because such processes lack collective mediation and discussion.

[29] See www.un.org/sc/suborg/sites/www.un.org.sc.suborg/files/20151123openbriefing_1.pdf.

[30] Loraine Sievers and Sam Dawes, *The Procedure of the UN Security Council*, 4th ed. (Oxford University Press, 2014).

complete exclusion of civil society actors from the global counter-terrorism architecture at the United Nations.[31]

23. The Special Rapporteur highlights that this expedited policy process has significant implications for public scrutiny, debate and input from relevant actors, including Member States that are not members of the Security Council and civil society organizations. As highlighted herein, Council resolutions such as 2178 (2014), many of whose provisions are overbroad and vague, including terms such as "terrorist act" that are unconnected to any specific definition or description of prohibited conduct, may create broadly defined criminal offences that fail to satisfy the principle of legality. Breaches of the proportionality principle are also implicated by broadly defined criminal offences. Moreover, recent Council resolutions have moved squarely to express criminal law regulation, with often tenuous links between ancillary and inchoate offences and principal offences associated with acts of terrorism. This move has momentous consequences for the regulation of conduct, and expressly infringes on the due process rights of persons in countries implementing Council resolutions as mandated by the Charter. The Special Rapporteur notes that meaningful consultation with criminal law and human rights experts across different legal systems, including experts within the United Nations system, at the drafting and negotiation stage would reveal and potentially ameliorate these regulatory consequences. At present, the speed and closed nature of the drafting process for counter-terrorism resolutions make such inputs unlikely.

## D. Security Council resolutions and foreign fighters

24. The activities of ISIL and other armed groups in Iraq and the Syrian Arab Republic and the flow of foreign fighters to the region led to the adoption of Security Council resolution 2170 (2014), swiftly followed by the adoption of resolution 2178 (2014). While both resolutions were adopted under Chapter VII of the Charter, resolution 2178 (2014) specifically builds on the model set by resolution 1373 (2001), establishing a set of far-reaching legislative obligations on all Member States.

25. The Security Council, in its resolution 2178 (2014), defined "foreign terrorist fighters" as "individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict". Under the resolution, States were required to suppress and prevent the recruitment, organization, transport and equipment of such foreign terrorist fighters, including by preventing their departure, entry and transit. The Special Rapporteur is of the view that such obligations need to be carried out in line with international human rights law, refugee law and international humanitarian law. The resolution also required States to enact the necessary legislation to prosecute persons who travel or attempt to travel to another State to perpetrate, plan, prepare or participate in terrorist acts or to provide or receive terrorist training, including persons who finance, organize the travel of or recruit "foreign terrorist fighters". The resolution did not specify how such compliance with international law would be assessed, nor was any specific guidance given to States in the resolution, which provides concrete specifics in other aspects. Critically, there are numerous ongoing debates in this arena concerning the application of international humanitarian law; how the material fields of application for article 3 common to the Four Geneva Conventions and Additional Protocol II intersect in real time and

[31] Stephanie David and Bailey Theado, *The United Nations Counter-Terrorism Complex: Bureaucracy, Political Influence and Civil Liberties* (International Federation for Human Rights, 2017).

territorial space with definitions contained in Council resolutions; and how the resolutions might affect the still relevant legal norm of self-determination.

26. In addition to the above, the Security Council called on States to take measures aimed at countering violent extremism, which can be conducive to terrorism, including by preventing radicalization, recruitment and mobilization, and to engage relevant local communities and non-governmental actors. States were further required to cooperate when addressing the threat posed by the foreign fighters phenomenon, in accordance with their obligations under international law, to enhance the effectiveness of mutual legal assistance agreements in criminal matters[32] and to intensify and accelerate the exchange of operational information to prevent the entry into or transit through their territories of persons believed to be foreign terrorist fighters.[33] The Council also called upon States to require that airlines operating in their territories provide advance passenger information to the appropriate national authorities, to improve international, regional and subregional cooperation to facilitate the uncovering of patterns of travel by foreign terrorist fighters and to prevent terrorists from exploiting technology. The human rights consequences of such regulatory requirements are immense, impinging on the non-refoulement principle, freedom of movement, expression and the right to private and family life.

27. The obligation to share information has been extended to cover not only those who qualify as foreign terrorist fighters in accordance with resolution 2178 (2014) but also, under resolution 2396 (2017), their families "travelling back to their countries of origin or nationality, or to third countries, from conflict zones". The Security Council's focus on family members represents a significant normative and procedural move, even more so in the light of the Council's demonstrated interest in regulating the "pre-criminal space". The array of actors implicated in these resolutions creates a ripple effect in human rights terms, whereby the repercussions in terms of human rights concern a much larger group than the subject matter of the resolutions might suggest, with a disproportionate effect on vulnerable and disadvantaged groups, particularly women and children.

28. Building on the previous body of recommendations and binding measures, Security Council resolution 2396 (2017) called on States to strengthen efforts in ways that may have further serious implications for domestic legal regimes, including by turning recommendations contained in previous resolutions into binding obligations under Chapter VII of the Charter. These domestic legal effects directly implicate the human rights obligations of States and may, de facto, neutralize the capacity of domestic human rights norms and institutions to operate effectively in protecting citizens and non-citizens alike.

29. Security Council resolution 2396 (2017) required States to establish advance passenger information systems "in order to detect the departure from their territories, or attempted travel to, entry into or transit through their territories, by means of civil aircraft, of foreign terrorist fighters" and other designated individuals, and to collect, process and analyse passenger name record data. Member States were encouraged to share such information to be used by all relevant national authorities, "with full respect for human rights and fundamental freedoms for the purpose of preventing, detecting and investigating terrorist offenses and related travel".

30. In the same resolution, the Security Council also imposed an obligation to develop "watch lists or databases of known and suspected terrorists, including foreign

[32] Security Council resolution 2396 (2017), para. 24, recommends that "in the absence of applicable conventions or provisions" States "cooperate when possible on the basis of reciprocity or on a case by case basis".

[33] See Security Council resolutions 2178 (2014), para. 9, 2322 (2016) and 2396 (2017), paras. 3 and 22.

terrorist fighters, for use by law enforcement, border security, customs, military, and intelligence agencies to screen travellers and conduct risk assessments and investigations" and to "develop and implement systems to collect biometric data, which could include fingerprints, photographs, facial recognition, and other relevant identifying biometric data, in order to responsibly and properly identify terrorists, including foreign terrorist fighters". Relevant obligations are to be formally implemented in compliance with international human rights law. The Special Rapporteur is deeply concerned that doing so, in practice, may be arduous, given the lack of specific guidance on protecting the specific human rights involved. Moreover, it remains entirely unclear which mechanisms are to be used to resolve conflicts between instruments and processes protecting human rights domestically and Council regulation. In these debates, regrettably, the exhortation to compliance and the perceived costs of non-compliance may far outweigh the compulsion to provide human rights protection.

31. While Security Council resolutions 2178 (2014) and 2396 (2017) appear to follow the same model for mandating compulsory action of a general nature as resolution 1373 (2001), close analysis shows that we are dealing with even more far-reaching instruments. While resolution 1373 (2001) criminalized conduct that had already been included in a convention negotiated under the aegis of the General Assembly and adopted without a vote, conversely, the conduct criminalized in accordance with paragraph 6 (a) of resolution 2178 (2014) was not reflected in any instrument negotiated in the context of a multilateral process. Hence, other than in that resolution, States had no basis in international law to criminalize travelling abroad with a "terrorist" intent. Similarly, States had no previous obligation under international law to set up watch lists, develop biometric databases and advance passenger information systems, or to develop passenger name record capacity, as required by resolution 2396 (2017). The resulting challenges in implementing resolution 2178 (2014) in a manner compliant with international human rights obligations have been addressed by numerous stakeholders, including by the previous Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism[34] and the Office of the United Nations High Commissioner for Human Rights (OHCHR).[35] Comparable granularity in analysis will also be needed in relation to the extensive obligations established more recently by the Council in its resolution 2396 (2017), but preliminary analysis suggests a pervasive degrading of human rights protection as well as process concerns for transposition of these obligations domestically.

32. It is not clear if any rights-related proportionality analysis was undertaken with respect to Security Council resolution 2178 (2014). There was no engagement with civil society about the rights-related impact of the resolution. Some of the human rights gaps evidenced in the resolution have been admirably filled by the working group on the rule of law and human rights established by the Counter-Terrorism Implementation Task Force, under the leadership of OHCHR, which has provided specific and concrete direction to States on how human rights may be negatively impacted by measures taken, and how such measures can be implemented in a human rights-compliant manner.[36] I express strong concern that the scope and breath of the resolution constitutes a broad encroachment on the regulation of criminal law broadly

[34] See A/HRC/29/51.

[35] See A/HRC/28/28.

[36] Office of the United Nations High Commissioner for Human Rights, *Guidance to States on Human Rights-Compliant Responses to the Threat Posed by Foreign Fighters* (New York, United Nations, 2018), available at: www.ohchr.org/EN/newyork/Documents/Human-Rights-Responses-to-Foreign-Fighters-web%20final.pdf.

defined, without corresponding protection for rights and liberties, as would be the norm if the same kind of legislation emanated within many national legal systems.

## E. Human rights protection and counter-terrorism resolutions

33. The expansion of institutional and legal counter-terrorism frameworks, policies and practices following the events of 11 September 2001 has been formidable.[37] Through its resolutions adopted after that date, particularly resolutions 1373 (2001), 2178 (2014) and 2396 (2017), the Security Council ensured that the obligation to prevent terrorism, coupled with other important ancillary duties, are now incumbent upon all States. Moreover, in a revolutionary stroke of the pen, the Council did not fix any geographical limits or prescribe any specific time frame as regards the imposition of these norms in resolution 1373 (2001).[38] More recently, resolution 2178 (2014), adopted under Chapter VII of the Charter, has been described as "one of the most important quasi-legislative efforts of the Council since resolution 1373 (2001)".

34. The Special Rapporteur emphasizes the fundamental challenges to human rights promotion and protection that follow from a lack of agreed and precise definition of terrorism applied across all counter-terrorism resolutions. This definitional gap has persisted to the present. Some attempts at clarity have been undertaken, but they are insufficient to address the human rights gaps and violations implicated. For example, in its resolution 1566 (2004), the Security Council adopted a definition of terrorist acts.[39] However, the Special Rapporteur considers that the early absence of a definition enabled the development of a doctrine of deference to State counter-terrorism practices in the formative period of action by the Council on counter-terrorism. She notes, in particular, that the terminology provided in resolution 1566 (2004) seems to have been interpreted by States as de minimis threshold, allowing for the adoption of broad domestic definitions in many jurisdictions. Such definitions may in turn lead to a broadening of the applicability of measures mandated under Council resolutions beyond what can legitimately be characterized as a threat to international peace and security and thus beyond what the Council intended. This also puts in question the legality of measures taken pursuant to expansive definitions, particularly when relevant measures limit human rights. By broadening the categories of conduct and groups or persons that such measures are applicable to, they risk becoming disjointed from the original legitimating purpose contained in the resolutions adopted by the Council.

35. The measures contemplated by the Security Council in its resolution 1373 (2001) had far reaching implications for the protection of human rights, but the resolution made no comprehensive or even specific reference to the need for States

[37] An extensive structure was created to support these norms. The Counter-Terrorism Committee was established by Security Council resolution 1373 (2001) and bolstered by resolution 1624 (2005). The implementation capacity of the Committee was enabled by the Counter-Terrorism Committee Executive Directorate. Sequentially, the Counter-Terrorism Implementation Task Force was established by the Secretary-General in 2005 and endorsed by the General Assembly through the United Nations Global Counter Terrorism Strategy, adopted in 2006. The Task Force organizes its work through working groups and counter-terrorism related projects. The Office of Counter-Terrorism was established by the General Assembly in its resolution 71/291.

[38] Vincent-Joël Proulx, "An incomplete revolution: enhancing the Security Council's role in enforcing counter-terrorism obligations", *Journal of International Dispute Settlement*, vol. 8, No. 2 (May 2017), p. 303.

[39] Security Council resolution 1566 (2004), para. 3: the Special Rapporteur underscores that the language in paragraph 5 of the resolution suggests that the definition was not intended to replace one adopted through a comprehensive multilateral process.

to comply with human rights standards in the suppression of terrorism.[40] Instead, the preamble to the resolution affirms the need to combat terrorist acts "by all means, in accordance with the Charter of the United Nations". As the Charter makes substantial references to human rights protection, this would constitute an implicit reference to the need to promote and respect human rights norms. However, the obliqueness of this positive interpretation only serves to highlight the lack of an explicit statement in the resolution, and "leaves the impression that human rights protection is a secondary consideration in the campaign against terrorism, instead of an essential component of any counter-terrorism strategy".[41] Furthermore, the only explicit reference to human rights norms in the operative paragraphs of resolution 1373 (2001) arises in the context of refugees and asylum-seekers, where States are required to take appropriate measures to ensure that such persons have not been involved in the commission of terrorist acts.

36. In subsequent resolutions, the Security Council began to include language on the need for States to ensure that "any measures taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law."[42] More recently, Council resolutions have started to incorporate language according to which "effective counter-terrorism measures and respect for [...] the rule of law are complementary and mutually reinforcing" and that they are "an essential part of a successful counter-terrorism effort."[43] Furthermore, some resolutions have emphasized the need to address the conditions conducive to the spread of terrorism,[44] including, but not limited to, "(...) the need to promote the rule of law, the protection of human rights and fundamental freedoms ...".[45]

37. While references to international human rights law have multiplied, the actual impact of such generic language, without clear and explicit human rights guidance provided in the text, is questionable. Such concerns are particularly pertinent, recalling the extensive human rights implications of actions mandated by some of the Security Council resolutions. In the absence of a comprehensive assessment of human rights impact allowing for a meaningful integration of human rights considerations, language stressing the importance of compliance with human rights standards rings hollow and artificial.

38. The United Nations counter-terrorism architecture has been consistently critiqued for its lack of attention to the human rights implications of its counter-terrorism regulation. Despite increasing references to human rights treaties in recent Security Council resolutions, including resolutions 2396 (2017) and 2170 (2014), in practice human rights have been "minimized to a generic line in a resolution, reduced to a few questions on a country visit survey, comprised of a small staff sprinkled throughout the Secretariat and Security Council bodies, securitized in the preventing violent extremism agenda, and underfunded in its programming".[46] The early assault on human rights may be traced to the immediate aftermath of the events of 11 September 2001, including: the lack of any formal institutional counter-balance to support mainstreaming human rights oversight of country action, reporting and assessment through the Counter-Terrorism Committee and its Executive

[40] International Helsinki Federation for Human Rights, *Anti-Terrorism Measures, Security and Human Rights* (2003), pp. 41 and 42.

[41] Ibid., p. 42.

[42] See Security Council resolutions 1535 (2004), 1456 (2003), para. 6, and 1624 (2005), para. 4.

[43] See Security Council resolutions 2129 (2013), 2170 (2014), 2178 (2014), 2395 (2017) and 2396 (2017).

[44] See resolution 60/288, annex, sect. I.

[45] See Security Council resolutions 1963 (2010) and 2129 (2013).

[46] David and Theado, *The United Nations Counter-Terrorism Complex*, p. 7.

Directorate;[47] the lack of access in any meaningful and systematic way for civil society actors and human rights defenders to the counter-terrorism architecture; and the minimal capacity of existing human rights entities within the counter-terrorism architecture.[48] The Special Rapporteur affirms that the process and substance concerns with regard to human rights are pressing and substantial, and that they require meaningful engagement by the United Nations counter-terrorism architecture as a whole.

## V. Promotion and protection of human rights while countering terrorism

39. Security is a human right, guaranteed in its most fundamental articulation in the Universal Declaration of Human Rights, which, under article 3, guarantees the right to life, liberty and security of person without distinction. This principle was translated into a universal norm in articles 6 and 9 of the International Covenant on Civil and Political Rights, to which 172 Member States are party. Security and human rights are not two practices or concepts at odds with one another. Rather, the two are fundamentally entwined and co-dependent. Security without human rights protections is an illusion, a colossus with clay feet. Rights without security is also a chimera, as having all rights theoretically means nothing in practice if people are not safe in their homes, streets, communities and countries.

40. The role of the Security Council in maintaining and protecting international peace and security is critical. Equally critical to security is the role of the Council in protecting the human rights of persons subject to its regulatory scope. As the regulatory capacity of Council action in the field of counter-terrorism has expanded, the scope of its obligations to protect and ensure respect for human rights has enlarged in parallel. The Special Rapporteur articulates profound concern that as counter-terrorism regulation expands it may do harm to the most essential human rights (freedom from torture, freedom of religion or belief, freedom of opinion and expression, freedom of peaceful assembly, freedom of association), and may have particular effects on historically disadvantaged groups, including women, laying the foundation for profound and unaccountable human rights violations and giving unfettered free rein to States to use Council resolutions as a defence mechanism for widespread human rights violations in the name of security. Itis time for the Council to engage in ensuring the totality of the Charter's purposes and to remain seized of its human rights obligations.

41. The vulnerability of human rights protections is evident through a close examination of domestic counter-terrorism practices. The Special Rapporteur and other mandate-holders are increasingly finding that multiple communications to their offices involve the use of counter-terrorism law and administrative practice against civil society and human rights defenders.[49] Human rights violations do not make the world safer or more secure, they undermine the security of all.

42. In her 2018 report to the Human Rights Council, the Special Rapporteur noted that a key principle of domestic procedures is that they satisfy and enable the principle

[47] The addition of human rights advisers at the Counter-Terrorism Executive Directorate is an improvement, but overall the organization does not adopt a human rights mainstreaming approach, has limited access to non-governmental organizations in consultation generally and specifically when it conducts in-country assessments, and human rights compliance is not a benchmarked element of assessment in state practice. See www.un.org/sc/ctc/focus-areas/human-rights/.

[48] See A/HRC/31/65; Commission on Human Rights Council resolution 2005/80.

[49] See https://spcommreports.ohchr.org.

of legality and proclamation within the State (particularly where legislative enactments may engage emergency or exceptional law), giving (ideally) ample and sufficient information to the public at large about the existence of exceptional regulation and the specific legal means being used to address the challenges faced by States (A/HRC/37/52, para. 18). In the same report, she also noted that counter-terrorism legislation (premised on the requirements of resolution 1373 (2001)) engages de facto emergency practice, and may in many cases trigger the necessity for derogation under international human rights treaty law obligations. A clear corollary of this assessment is that Security Council resolutions may themselves constitute a form of emergency power authorization, without engaging the safeguards that would normally follow at the domestic level from the instigation of emergency powers under most national legal systems. The absence of safety or review mechanisms on the exceptional implications of Council mandates constitutes fundamental lacunae in the existing regulatory pattern for global counter-terrorism regulation. These gaps have adverse implications for the protections of human rights, and on the integrity of the human rights treaty system as a whole. In practice, the operationalization of such protections for exceptional legal regulation falls entirely within the domestic arena, although domestic procedural protections may be insufficient when the trigger to regulation comes from the Council.

43. The Special Rapporteur points out that supranational legal regulation, including such devices as Security Council resolutions and European Union directives, can impinge on the prerogatives of national legal systems and undermine the procedural and rights-based protections entrenched in national law designed precisely to protect against overreach by emergency powers. The Special Rapporteur affirms that international practice by supranational bodies addressing terrorism must not impinge on the protection of rights contained within national constitutions and procedures, which must themselves be human rights-compliant. This caution needs to be borne in mind given the increasingly dense production of global regulation connected to counter-terrorism and violent extremism, which is often tone-deaf to domestic human rights protections and procedures amplifying and supporting rights. Moreover, the Special Rapporteur notes her concern about: the ways in which international obligations are used as a rationale for failing to conform to domestic legal requirements; new forms of counter-terrorism regulation that expressly work around or limit the full operation of domestic legal constraints, including supranational legal dictates that fail to pay attention to the legality requirements of national legal systems; and the use of ordinary law as a vehicle for substantive and far-reaching counter-terrorism regulation that circumvents the requirements of notification and proclamation. It should also be noted that Governments are regularly fast-tracking extensive counter-terrorism legislation, leaving little time for consideration of the impact on rights, obfuscating obligations to notify international treaty bodies of the measures and entrenching permanent securitization.

44. The Special Rapporteur explicitly pinpoints the link between the human rights gaps found in multiple Security Council resolutions and the human rights gaps that are evident at the national level. She makes that obvious point that, as affirmed in the United Nations Global Counter-Terrorism Strategy and in the increased attention to preventing and countering violent extremism within the United Nations system, serious human rights violations, allied with rule of law deficits are an integral part of the conditions conducive to terrorism.[50] The Council does not serve its own peace and security interests well if it ignores this fundamental connection and is not fully

[50] United Nations Development Programme, *Journey to Extremism in Africa: Drivers, Incentives and the Tipping Point for Recruitment* (2017), available at **Error! Hyperlink reference not valid.**.

cognizant of the relationship between repressive counter-terrorism measures and those very conditions.

45. The Special Rapporteur underscores the specific tensions inherent in criminal law regulation by international organs and institutions. These tensions have been well-recognized in regional contexts, and the establishment of rights-bearing norms within those systems (for example. the Charter of Fundamental Rights of the European Union), as well as active judicial oversight (for example the fundamental rights jurisprudence of the European Court of Justice) is testament to the necessity of mainstreaming rights in contexts where supranational legislative mechanisms impinge on individual and group rights.[51] These regional arrangements and the deep integration of rights into their operations underscores further the evident gaps in Security Council resolutions, and the distinct and unmistakable human rights gaps in the supranational counter-terrorism sphere. The Special Rapporteur notes that while the process of the universal periodic review, the oversight of treaty monitoring bodies and the role of independent mandate-holders are important human rights processes, intersecting with the downstream effects of counter-terrorism, they collectively operate with significant limitations in providing timely, enforceable and sustained oversight of the human rights violations that may follow from counter-terrorism regulation.

## VI. Observance and enforcement of international humanitarian law

46. Counter-terrorism operations and measures are frequently undertaken in the context of armed conflict where international humanitarian law applies. This reality is illustrated by the number of non-international armed conflicts involving armed groups subject to United Nations terrorist designation and its targeted sanctions regime or included on regional and national terrorist sanctions lists. Against this background, the International Committee of the Red Cross and other stakeholders have warned that the lack of sufficient consideration regarding the interaction between international humanitarian law and the norms and standards relevant to countering terrorism was leading to a troubling conflation of the two.[52]

47. Whereas Security Council resolutions enacted in recent years stress the importance that State measures in response to terrorism be in line with obligations under international humanitarian law, [53] such generic mentions fall short of meaningfully addressing concerns about counter-terrorism measures undermining the multilaterally agreed protection of international humanitarian law. In this regard, the Special Rapporteur notes the tendency on the part of some States to equate any use of force by a non-State actor to terrorism, even if the respective conduct occurs in the context of an armed conflict as defined by international humanitarian law and is not in violation of the international norms governing such conflicts. It is reported that numerous jurisdictions resort to counter-terrorism legislation to criminalize acts that

[51] See for example, European Court of Human Rights, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, Case Nos. C-402/05 P and C-415/05 P, Judgment of the Court, 3 September 2008; Fiona de Londras, "Accounting for rights in EU counter-terrorism: towards effective review", *Columbia Journal of European Law*, vol. 22, No. 2 (Spring 2016), p. 237.

[52] International Committee of the Red Cross (ICRC), *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts* (32IC/15/11).

[53] See, for example, Security Council resolutions 1535 (2004), 1456 (2003), para. 6, and 1624 (2005), para. 4.

are either not prohibited or are protected under international humanitarian law.[54] The Special Rapporteur underscores the importance of a universally accepted definition of terrorism and terrorism-related offenses that duly considers the interplay of obligations under different bodies of law, with particular emphasis on the law governing armed conflicts.

48. Security Council-mandated measures addressing the foreign fighter phenomenon, in particular resolution 2178 (2014), have, arguably, further contributed to the blurring of the lines between terrorism and international humanitarian law. Resolution 2178 (2014) addresses persons who qualify as "foreign terrorist fighters" recruited by terrorist groups, including but not limited to entities listed in the context of the 1267 (1999) sanctions regime. While using the word "fighter", a term commonly employed to describe a person with a combat role belonging to an organized non-State armed group, party to a non-international armed conflict,[55] the scope of the resolution is not restricted to addressing such conflicts nor is the definition of a "foreign terrorist fighter" limited to persons taking direct part in hostilities as members of terrorist groups party to an armed conflict. By referring to these persons as "terrorist fighters", the resolution reinforces the problematic assumption that taking direct part in hostilities automatically amounts to a terrorist offense.[56] Furthermore, the unintended results may include an expanded application of international humanitarian law to situations that fall below the threshold of an armed conflict. Considering the lower protection level resulting from the application of the law of armed conflict, including the rules governing use of force and deprivation of liberty, the related human rights concerns are evident. The diverging domestic definitions of terrorism and terrorist groups may further exacerbate the above-described negative effects.

49. The presence of designated terrorist organizations may have a chilling effect on the activities of humanitarian organizations in armed conflict contexts. Sweeping definitions of "association with", "support" or "assistance" to terrorist organizations has been highlighted as potentially criminalizing a broad range of conduct, including that of organizations carrying out activities that are exclusively humanitarian and impartial in nature.[57] The Special Rapporteur notes that the General Assembly has repeatedly urged States, including in the recent review of the United Nations Global Counter-Terrorism Strategy, "to ensure, in accordance with their obligations under international law and national regulations, and whenever international humanitarian law is applicable, that counter-terrorism legislation and measures do not impede humanitarian and medical activities or engagement with all relevant actors as foreseen by international humanitarian law" (see resolutions 72/284, para. 79, and 70/148). Thus far the Security Council has not established a sector-wide humanitarian exemption in relevant counter-terrorism resolutions. While the regime established under Council resolution 1267 (1999), and further developed in a number of subsequent resolutions, including resolution 1452 (2002), provides for the possibility of limited "individual exemptions" for humanitarian action, resolution 1373 (2001) and subsequent resolutions do not provide an exemption. The Special Rapporteur warns of the unreflective adoption of measures lacking meaningful impact assessment

[54] Stéphane Ojeda, "Out of balance: global counter-terrorism and the laws of war", blog, Humanitarian Law and Policy, 15 September 2017.

[55] See https://casebook.icrc.org/glossary/fighters.

[56] For example, Sandra Krähenmann, "The obligations under international law of the foreign fighter's state of nationality or habitual residence, state of transit and state of destination", in Andrea de Guttry, Francesca Capone and Christophe Paulussen, eds., *Foreign Fighters Under International Law and Beyond* (The Hague, T.M.C. Asser Press, 2016), p. 240.

[57] See ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts* (31IC/11/5.1.2); S/2016/827, para. 19.

and considers that humanitarian exemption clauses should be a consistent feature in relevant resolutions.

## VII. Recommendations

50. **The Special Rapporteur makes the following recommendations to safeguard the critical regulatory role of the Security Council in addressing and regulating the peace and security implications of terrorism, complemented by an active and sustained commitment to the meaningful enforcement of human rights in the same sphere:**

(a) **States are encouraged to move beyond using the oft repeated mechanical phrase of commitment to observe human rights generically ("should adopt such measures in accordance with international law, in particular international human rights, refugee and humanitarian law") and to adopt specific and directive human rights obligations for States in legislative resolutions and to ensure that specific obligations to legislate in specific arenas are linked to the protection and promotion of specific enumerated rights implicated by particular measures: respect for human rights and the rule of law must be the bedrock of the global fight against terrorism, and beyond rhetoric this principle must be reflected in practice, procedure and institutional culture;**

(b) **The absence of a consistent definition of terrorism across Security Council resolutions cedes extraordinary latitude to States and supranational organizations to define terrorism broadly, vaguely and in ways that unduly limit the exercise of human rights at national levels: closing this gap is essential to prevent nefarious definitions of terrorism from proliferating at the domestic level, thus undoing and undermining the broader security interests of the international community as well as impacting negatively on the protection of human rights;**

(c) **States are encouraged to use precise and defined terminology when quasi-legislative requirements are being advanced by Security Council resolutions: terms such as "incitement" and "material support" must be given precise legal meaning, consistent with the principles of legality and proportionality as the absence of such precision creates conditions under which counter-terrorism norms can be abused domestically, undermining human rights protections for individuals and groups;**

(d) **Given the sensitivity of an expanded quasi-regulatory role for the Security Council, and the natural concerns of States regarding their sovereignty, the Special Rapporteur: (i) encourages broader consultation and transparency with Member States in respect of "legislative" resolutions: the Special Rapporteur notes that Council resolution 1373 (2001) was adopted within a time span of 48 hours; that there was no Security Council debate before the adoption of resolution 2178 (2014); and that there was tightly constrained consultation in respect of resolution 2396 (2017); a commitment to transparency would include open debate; and, in general and where possible, fast-track legislative processes by the Council implicating human rights should be avoided: (ii) in cases where such a process takes place, the Special Rapporteur encourages a meaningful commitment to human rights, which should include innovative procedural responses, for example an ex ante rights impact analysis; and (iii) when general, binding rules are being deliberated, all States should be considered as affected States in the sense of Article 31 of the Charter of the United Nations; greater and transparent consultation may prevent downstream legal jeopardy in the process of regional or national transposition, as well as addressing some of the**

**implementation and coordination challenges that were faced in the implementation of resolution 1373 (2001);**

**(e) The Special Rapporteur encourages States to consider a form of a priori human rights review for Security Council resolutions in the counter-terrorism domain that have a quasi-legislative character and that mandate criminal law regulation at the domestic level: the procedural capacity of the Council to set its own terms of regulation is considerable; advancement on an internal procedural mechanism agreed among States to ensure that the object and purpose of the Charter is met would go a considerable way to satisfy legitimacy, legality and proportionality concerns that have been raised in respect of Council resolutions adopted after 11 September 2001;**

**(f) The Special Rapporteur affirms that the Security Council is the preeminent body best placed to set exemplary human rights compliance criteria as States advance their counter-terrorism goals; the Council is also best placed to model most effectively the duty of States to respect, promote and fulfil human rights; this is enabled through the operational capacity of the Counter-Terrorism Committee as supported by the Counter-Terrorism Executive Directorate, which are well-placed to assess whether States are in full and meaningful compliance with their human rights obligations in the implementation of multiple counter-terrorism resolutions; human rights compliance must be centralized in counter-terrorism compliance assessments based on rigorous criteria, drawing upon the standards and assessment tools developed by OHCHR, complemented by the expertise of human rights bodies, including the Human Rights Committee, and taking into account the country reporting of the Special Rapporteur of the Human Rights Council on the protection and promotion of human rights and fundamental freedoms while countering terrorism (also a member of the Counter-Terrorism Implementation Task Force), as well as the developing expertise of the Task Force's working group on promoting and protecting human rights and the rule of law while countering terrorism;**

**(g) The Special Rapporteur reminds States that human rights compliance under the principles and purposes of the Charter is not merely an externally facing obligation but is also internally facing: benchmarking and assessing the performance of the Security Council in advancing human rights should be a reflective practice, encouraged and supported by the multiple entities that constitute the United Nations counter-terrorism architecture;**

**(h) The Special Rapporteur reminds States that when extraordinary legislative measures are taken at the domestic level in respect of terrorism or other security challenges, they contain sunset clauses and/or mechanisms of periodic review of such provisions; these elements constitute explicit recognition of the exceptionality of regulation in the context of particular threats, acknowledging that such powers often only need to be used for finite periods, and that the scope and impact requires human rights benchmarking and oversight: it is notable that such procedural protections are entirely absent from Security Council resolutions that may possess the character of emergency powers in their own right; in this regard, the Special Rapporteur encourages States to reflect seriously on this gap, and to remedy it by adopting best practices (sunset clauses and review) at the national level to parallel regulation internationally;**

**(i) Recalling that all Member States are obliged to take joint and separate action in cooperation with the United Nations for the achievement of the purposes set out in Article 55 of the Charter, the Special Rapporteur encourages the General Assembly to remain seized of the opportunity and obligation to promote and ensure respect for human rights, particularly through deepening**

**the rule of law capacity of the Office of Counter-Terrorism, supporting the oversight and expertise of OHCHR and making the commitment to mainstream human rights, as affirmed in the fourth pillar of the United Nations Global Counter-Terrorism Strategy, honoured in practice.**

United Nations A/73/362

General Assembly

Distr.: General
5 September 2018

Original: English

**Seventy-third session**
Item 74 (b) of the provisional agenda*
**Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms**

# Elimination of all forms of religious intolerance**

## Note by the Secretary-General

The Secretary-General has the honour to transmit to the members of the General Assembly the interim report of the Special Rapporteur on freedom of religion or belief, Ahmed Shaheed, submitted in accordance with Assembly resolution 72/177.

* A/73/150.

** The present document was submitted after the deadline so as to reflect the most recent developments.

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# Interim report of the Special Rapporteur on freedom of religion or belief

*Summary*

In the present report, the Special Rapporteur on freedom of religion or belief, Ahmed Shaheed, highlights the interrelationship between freedom of religion or belief and violent extremism. He stresses the duty of States to ensure that any restriction imposed on the right to freedom of religion or belief must strictly comply with the limitations regime stipulated by international human rights law. He argues that ensuring the rights of all persons reduces conflict involving religion or belief, thereby better facilitating human security.

While cautioning against securitizing religion or belief, the Special Rapporteur urges States to operationalize various tools developed by the United Nations system in the context of freedom of religion or belief and the prevention of mass atrocities, and which are grounded in the human rights framework, to build societal resilience against violent extremism. He encourages States to develop national action plans with the participation of national human rights institutions, civil society organizations and development partners to facilitate the implementation of specific roles contained in these tools for national and international actors, including the mass media, judicial authorities, oversight bodies, civil society, religious leaders and faith-based actors. He further calls on the relevant United Nations mechanisms to encourage the formulation of these plans and increase transparency on their implementation and, in particular, to support the convening of the seventh meeting of the Istanbul Process for Combating Intolerance, Discrimination and Incitement to Hatred and/or Violence on the Basis of Religion or Belief.

# I. Activities of the Special Rapporteur

1. The Special Rapporteur undertook a visit to Tunisia from 9 to 19 April 2018. He will present the report on that mission at the fortieth session of the Human Rights Council to be held in March 2019. He has also accepted an invitation from the Government of Sri Lanka to visit that country in December 2018.

2. During the reporting period, the Special Rapporteur continued to participate in international gatherings related to the right to freedom of religion or belief. He participated in a meeting of the International Contact Group on Freedom of Religion or Belief held in Geneva on 6 March 2018, and attended a workshop on interreligious dialogue held in the Sudan on 8 and 9 May. On 23 May, he attended a symposium on freedom of religion or belief, cultural rights and women held in Geneva. In Vienna, on 5 June, the Special Rapporteur addressed the Human Dimension Committee of the Organization for Security and Cooperation in Europe, and on 12 June he participated in the Global Media Forum held in Bonn, Germany. He also took part in discussions with the Working Party on Human Rights and the Working Party on Fundamental Rights, Citizens Rights and Free Movement of Persons of the Council of the European Union in Brussels on 13 June. On 28 June, he attended a consultation in Geneva on ways to improve the engagement of the mandate with monitors of anti-Semitism. He participated in a consultation on the Rabat Plan of Action and Asia held in Geneva on 29 June and attended the "Ministerial to Advance Religious Freedom" in Washington, D.C., on 25 and 26 July.

# II. Relationship between freedom of religion or belief and national security

3. The "war on terrorism" since the beginning of the twenty-first century has been marked by extraordinary national security measures which have resulted in myriad violations and abuses of fundamental human rights and principles, including the right to freedom of religion or belief. Amid legitimate demands to ensure public safety and national security, Governments have instituted stricter regulations on religious expression and the role of religion or belief in the public sphere, both online and off. Some States have instituted discriminatory practices that intentionally or unintentionally target individual adherents or groups of persons of a particular faith they perceive to be predisposed to terrorist or other violent acts. Others have adopted measures which violate the right to form and hold opinions based on conscience, especially those beliefs deemed objectionable or offensive to others or infringe on the *forum internum* of the right to freedom of religion or belief.

4. In less than a decade, stakeholders began to recognize the complexities of the challenges posed by this type of violence and acknowledged the need for a more comprehensive approach which encompasses not only ongoing, essential security-based counter-terrorism measures but also systematic preventive measures which directly address the drivers of violent extremism and terroristic acts (see A/70/674).[1] The new approach recognized the importance of countering both the immediate triggers of terrorism and the root causes that foster conditions conducive to the spread of terrorism. The new strategy also stressed the importance of addressing the rights of the victims of violent extremism and terrorism as well as those whose rights have

[1] There is no internationally agreed definition of "violent extremism". However, the emerging usage within the United Nations is "violent extremism ... conducive to terrorism" (see Security Council resolution 2178 (2014)). See also paras. 23–27 below.

been violated by counter-terrorism law and practices (see A/70/674 and A/HRC/16/51).

5. In 2006, the United Nations Global Counter-Terrorism Strategy adopted by the General Assembly established respect for human rights and the rule of law as one of its four pillars, recognizing a human rights-based approach as key to global efforts (see resolution 60/288). Notwithstanding that recognition, measures that have since been adopted by States continue to erode respect for civil liberties. Various measures have expanded the ambit of criminalized activity, with ever-increasing attention being paid to early intervention tactics intended to dissuade individuals potentially on a path towards supporting or committing violent extremist acts. However, a lack of consensus definitions for key concepts, such as "radicalization" or "violent extremism", has undermined both the effectiveness of various measures and the ability to assess their compliance with State obligations under international human rights law.

6. Human rights monitors have criticized initiatives to prevent and counter violent extremism for their erosion of civil liberties, their propensity for perpetuating discrimination against several religious or belief communities, their lack of transparency and accountability and for securitizing religion.[2] In his 2016 report on the human rights impact of initiatives to prevent and counter violent extremism, the former Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson, highlighted elements of such programmes that continued to infringe on a range of human rights and fundamental freedoms, including freedom of religion or belief. He concluded that "a wide array of legislative, administrative and policy measures are pursued that can have a serious negative impact on manifold human rights ... [and] can stigmatize groups and communities, undermining the support that Governments need to successfully implement their programmes, and having a counter-productive effect" (see A/HRC/31/65, para. 54).

7. The question of how to effectively address national security exigencies while respecting human rights constitutes a pivotal challenge to human security today. Contrary to the discourse which posits freedom of religion or belief (and other human rights) and national security to be competing and mutually exclusive values that have to be "balanced" against each other, various mandate-holders, including the Special Rapporteur on freedom of religion or belief, have over the past three decades recognized the complementary, interdependent and mutually reinforcing relationship between the promotion and protection of human rights, including freedom of religion or belief, and national security.

8. Moreover, it should be noted that "national security" is not a permissible ground for restricting manifestations of religion or belief under article 18, paragraph 3, of the International Covenant on Civil and Political Rights. However, restrictions on a number of rights that are related to the enjoyment of the right to freedom of religion or belief, such as freedom of expression or association, are permissible to ensure national security if the further conditions of the related limitation clauses are also met. Regardless, the right to freely manifest religion or belief can only be limited if the following five conditions are strictly met: (a) the measure in question is prescribed by law (i.e., it is accessible, foreseeable and drafted with sufficient precision to enable a rational person to regulate his or her conduct); (b) it is necessary for the purposes

[2] See, for example, Amnesty International, *Dangerously Disproportionate: The Ever-Expanding National Security State in Europe* (London, 2017). See also the report of the former Special Rapporteur on freedom of religion or belief, Asma Jahangir, warning about the counterproductive impact of religious profiling in her report to the Human Rights Council (see A/HRC/7/10/Add.3, para. 41).

of protecting public safety, order, health or morals, or the fundamental rights and freedoms of others; (c) it conforms to the principle of proportionality; (d) it is applied in a way that does not vitiate the rights guaranteed under freedom of religion or belief; and (e) it is not discriminatory in purpose or effect.

9. Furthermore, empirical research shows that increased respect for freedom of religion or belief for all is associated with lower levels of religious persecution and of conflicts based on religion.[3] Studies on "horizontal inequalities" also demonstrate that inequality and discrimination on the basis of religious identity are also likely to increase the occurrence of conflicts.[4] As a result, it is essential that the authorities responsible for meeting security needs engage with, and listen to, those who exercise agency with regard to freedom of religion or belief,[5] as well as actors involved with promoting civil liberties.

10. In the present report, the Special Rapporteur briefly explores how violence in the name of religion or belief has affected perceptions about the relationship between human rights and national security. He contends that strategies to prevent violent extremism have tended to alienate a range of religious or belief communities, undermining the enjoyment of several fundamental freedoms and defeating the ultimate objectives of enhancing public safety, tolerance and mutual understanding (see A/HRC/31/65).[6] Consequently, the Special Rapporteur asserts that, in certain ways, some policy practices for countering violent extremism have "securitized" religion or belief, wherein religion is perceived as a threat requiring extraordinary, punitive legal and policy measures.[7]

11. As a result, freedom of religion or belief and the range of rights on which it depends are being undermined or violated, public trust and societal resilience is being enfeebled and efforts to prevent violent extremism are being undercut. Therefore, the Special Rapporteur also argues that ensuring the right to freedom of religion or belief for all persons reduces conflict involving religion or belief, thereby better facilitating social cohesion and human security.

12. Finally, the Special Rapporteur surveys some of the initiatives undertaken within the United Nations human rights framework to mobilize respect for freedom of religion or belief as a positive resource for strengthening societal cohesion, reinforcing public trust and enhancing resilience against violent extremism, in line with the agenda for implementation outlined by the Special Rapporteur in his first report to the Human Rights Council (A/HRC/34/50).

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[3] Brian Grim and Roger Finke, *The Price of Freedom Denied: Religious Persecution and Conflict in the Twenty-First Century* (Cambridge University Press, 2010). See also A/HRC/70/674, paras. 26 and 28.

[4] Discrimination on the basis of religion or belief is one among several factors that empirical research into horizontal inequalities considers. See, for example, Frances Stewart, "Horizontal inequalities as a cause of conflict" (2009). Available at www.bradford.ac.uk/social-sciences/media/socialsciences/BDLStewart.pdf.

[5] This includes the need to consult religious and other minorities in matters which affect them, as upheld in minority rights (see article 2, paragraph 3, of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (General Assembly resolution 47/135, annex)).

[6] See also Faiza Patel and Amrit Singh, "The human rights risks of countering violent extremism programs", 7 April 2016. Available at www.justsecurity.org/30459/human-rights-risks-countering-violent-extremism-programs/.

[7] Barry Buzan, Ole Wæver and Jaap de Wilde, *Security: A New Framework for Analysis* (London, Lynne Rienner Publishers, 1998).

# III. A broad spectrum of national laws and practices

13. States have responded to violent extremism with a rapid proliferation in legislative, administrative and policy measures that target a range of activities carried out by both individuals and communities. The measures include legislation that criminalizes the presumed "precursors" to terrorism (i.e., speech deemed to be "extremist", racist, xenophobic or discriminatory), and activities that focus on countering the recruitment strategies advanced by terrorist groups. Some States have supported programmes that focus on the so-called triggers for violent extremist behaviour by promoting civil society interventions or fostering the capacity of certain communities to advance detection and counselling programmes. Others have adopted measures that focus on the underlying conditions, or drivers, of violent extremism.

14. In many cases, State responses to violent extremism pose serious challenges to the defence of freedom of religion or belief. They have responded to violent extremism by: (a) enacting new laws and policies which directly restrict freedom of religion or belief; (b) curtailing enjoyment of freedom of religion or belief as a consequence of setting limitations on other fundamental rights; or (c) scrutinizing religious organizations and intruding into the religious affairs of religious communities. In recent years, a number of joint communications have been issued to States by the special procedures mandate holders, together with the Special Rapporteur on freedom of religion or belief, concerning direct discriminatory practices and heavy-handed State restrictions imposed on persons belonging to religious or belief minorities who are alleged to be threats to the public order.

## A. Registration requirements

15. Many Governments have become concerned about the possibility that groups viewed as "extremist", or deemed to be threats to national identity or the public order, could acquire legal personality, thereby gaining benefits, exemptions and other entitlements. Some States have addressed these concerns by creating mandatory registration systems, denying or revoking the registration of certain communities, enacting more restrictive registration laws or requiring formerly registered communities to re-register (see A/HRC/22/51, paras. 42–43).

16. As a consequence of such measures, some religious or belief communities have been unable to gain access to or maintain legal personality status. Access to legal personality falls within the scope of the right to freedom of religion or belief. It is essential for the day-to-day operations of many religious or belief communities. However, under international human rights law, religious or belief communities are not obliged to seek legal personality if they do not wish to do so. Individual believers and non-believers and religious or belief communities still hold rights under international human rights law even if formal recognition for their faith is not provided for or not granted by a State or authority, or even if it is revoked.

17. Regardless, depriving a religious or belief community of legal status can have a tremendous impact on the collective aspects of the right to freedom of religion or belief, including the ability of adherents to practice their faith together with others — jeopardizing the viability of the community itself. Absence of legal personality also raises questions of property ownership for these communities, including those which

function as places of worship and education. Again, that can directly affect the collective dimension of the human right to freedom of religion or belief.[8]

## B. Freedom of movement

18. Some States have modified various aspects of their legislation to prevent the internal movement of individuals considered to be "extremists", which can result in discriminatory practices involving religion or belief. Contrary to international human rights norms, these practices include initiatives to relocate individuals within their country of residence or nationality, measures that amend the rules applicable to asylum seekers or migrants and steps to review citizenship rules and even revoke citizenship. Such measures can obviously have a serious impact on freedom of movement. They also negatively affect the right to the presumption of innocence and the right to due process, the right to be protected against the arbitrary deprivation of nationality, the right to liberty and security and the right to freedom of religion or belief (see A/HRC/31/65, para. 41).

## C. Profiling, surveillance and harassment

19. States also continue to adopt, within the framework of preventing and countering violent extremism, legislation and policies that profile members of certain religious or belief groups (which are deemed by the State concerned as inclined towards "radicalization", "extremism", or criminality) on the basis of stereotypes, including policies that classify peaceful manifestations of religious belief as indicators of support for violent extremism. Others are increasingly misusing vaguely worded national security measures to target political opponents, human rights defenders, journalists, environmental activists, artists and labour leaders. Many other States have concerns that some places of worship are environments for radicalization that will lead to terrorism and/or recruitment by groups that espouse violence, and have responded by reviewing sermons, screening and interrogating those who enter and leave places of worship and employing other monitoring activities. Occasionally, Governments have shuttered places of worship and prohibited certain religious leaders from maintaining or being appointed to certain positions in the community.

20. Moreover, according to a study, there are still Governments who use security reasons to formally ban religious or belief groups and render membership in these groups a criminal offence.[9] The criteria for this do not always appear to be clear, or closely connected to proof of the group's engagement in or material support for violence or its incitement. Some States only recognize a specific religion or religions, restrict the practice of other religions or beliefs and invoke so-called security measures to inhibit the promotion of those religions, often contending that allowing for the practices of different religions or beliefs would increase social hostilities. In many cases, persons prosecuted under these laws are deemed to be members of a faith or belief community that "distorts" the interpretations of "recognized" religions.

21. In a similar vein, for some States the promotion of a specific religion or religions is, in fact, a matter of national identity and therefore its protection is, in itself, treated

[8] For a rich discussion of the negative impact of this, see Organization for Security and Cooperation in Europe (OSCE), *Guidelines on the Legal Personality of Religious or Belief Communities* (Warsaw, OSCE Office for Democratic Institutions and Human Rights, 2014). Available at www.osce.org/odihr/139046.

[9] Pew Research Center, *Global Uptick in Government Restrictions on Religion in 2016* (2018). Available at www.pewforum.org/2018/06/21/global-uptick-in-government-restrictions-on-religion-in-2016/.

as a national security imperative (see A/HRC/37/49). These States may, therefore, promote a specific religion or religions through indirect means, as opposed to official legislation. For example, States may promote a particular religion, or an interpretation of a religion, through social media and official Government statements while simultaneously securitizing other religions or beliefs in order to limit proselytization among national populations.[10]

# IV. Key challenges to preventing and countering violent extremism and protecting freedom of religion or belief

22. The protection of the right to freedom of religion or belief while countering violent extremism is complicated for a number of reasons. First, the lack of a consensus definition as to what constitutes "violent extremism" undercuts the development of a cogent global strategy for countering terrorism and preventing violent extremism and contributes to abusive practices, such as the conflation of beliefs and practices that are believed to be extreme with "violent extremism". Second, the use of violence in the name of religion or belief by some tends to stigmatize other members of that religion or belief community, regardless of their conduct. Third, as mentioned in paragraph 8 above, although what one believes or does not believe is absolutely inviolable, the public manifestation of religion or belief may be restricted in exceptional circumstances and in strict compliance with the limitations regime prescribed by international law. Finally, the right to freedom of religion or belief is both reinforced and challenged by other human rights, such as freedom of expression.

## A. Defining "violent extremism"

23. The former Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Mr. Emmerson, noted in his 2016 report to the Human Rights Council that a significant challenge to countering violent extremism was the lack of a universally accepted comprehensive definition for identifying instances of such acts (see A/HRC/31/65, para. 55). Moreover, the existing international legal framework on counter-terrorism stipulates obligations in relation to terrorism and violent extremism without providing a comprehensive definition of these terms.[11] This has led United Nations entities that are engaged in preventing or countering violent extremism and many States to adopt overly broad definitions that are prone to unintended human rights abuses and even the deliberate misuse of the term (see A/HRC/31/65).

24. Another former Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, warned that "there is a risk that the international community's use of the notion of 'terrorism', without defining the term, results in the unintentional international legitimization of conduct undertaken by oppressive regimes, through delivering the

[10] Sos Avetisyan and others, "The 'mantra of stability' versus human security in the post-Soviet space", *Global Campus Human Rights Journal*, vol. 1, No. 2 (2017).

[11] However, the International Convention for the Suppression of the Financing of Terrorism, art. 2 (b), defines a terrorist act as: "Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act."

message that the international community wants strong action against 'terrorism' however defined" (see E/CN.4/2006/98, para. 27).[12]

25. It should be noted that radical or extreme views, in and of themselves, are not a threat to society if they are unconnected to violence or other unlawful acts, such as incitement to violence or discrimination, as legally defined in compliance with international human rights law. Moreover, the term "radical" has no clear meaning, and as a result the presumption should be that the right to hold and express such views and opinions is protected as a matter of international human rights law. Furthermore, there is no clear-cut pathway towards terrorism and no consistent set of factors driving terrorist radicalization. Profiles built on stereotypical assumptions based on religion, race, ethnicity, gender and socioeconomic status and so on are not only discriminatory but also ineffective.[13]

26. The United Nations High Commissioner for Human Rights and regional bodies have criticized laws that criminalize "extremism" for their targeting of non-violent conduct and their use of broad and imprecise definitions.[14] Pursuant to articles 18 and 19 of the International Covenant on Civil and Political Rights, the right to hold an opinion and the freedom to have or adopt a religion or belief of one's choice (*forum internum*) cannot be subject to any restriction.[15] States often conflate "extremism" and "radicalization" with violence, which is problematic since there is no empirical evidence to suggest a predictable link or linear progression from "extremist" thinking to violent acts. Moreover, alleging that a person or group of persons is "extremist" is not tantamount to proving that they are violent. Only those who have been ascertained as planning to carry out or perpetuating violent extremist acts can be deemed so.

27. States should, therefore, ensure that the focus of their security-oriented measures to prevent and counter violent extremism is on actual conduct, rather than opinions or beliefs, if they are to be both efficient and effective. States must demonstrate with clear evidence that individuals or groups of individuals have been involved in activities that incite discrimination or violence, or that they are undermining the rights and freedoms of others in other tangible ways, before any punitive steps are taken. The measures must be prescribed by law and be necessary, proportionate and non-discriminatory. That said, States must also foster the conditions under which extremist narratives that fall short of, or indeed cross, the threshold of incitement to violence are challenged, exposed and discredited, without removing space for the exercise of the rights to the freedoms of thought, conscience, religion or belief and of opinion and expression.

## B. Misinterpretations of radicalization

28. History is replete with examples of religion or belief, or interpretations of religion or belief, being used to support or justify heinous acts of violence and discrimination. Such justifications have been identified as a source of sectarian

[12] In his final report to the Human Rights Council, Mr. Scheinin offered model definitions of terrorism and incitement to terrorism (see A/HRC/16/51, paras. 29–32).

[13] L. Slachmuijlder, *Transforming Violent Extremism: A PeaceBuilder's Guide* (Washington, D.C., Search for Common Ground, 2017).

[14] See A/HRC/33/29, paras. 18 and 61; European Commission for Democracy through Law, *Opinion on the Federal Law on Combating Extremist Activity of the Russian Federation*, No. 660/2011, CDL-AD (2012)016, paras. 31, 35–36, 49; and European Court of Human Rights, *Case of Mariya Alekhina and Others v. Russia*, application No. 38004/12, Judgment of 17 July 2018, paras. 257 and 267–268.

[15] See A/HRC/33/29, paras. 61–62; Human Rights Committee, general comment No. 22 (1993) on the right to freedom of thought, conscience and religion, para. 3; and Human Rights Committee, general comment No. 34 (2011) on the freedoms of opinion and expression, para. 9.

conflict, used to legitimize wars of conquest and to perpetuate deplorable acts of disregard for equality and basic respect for human dignity. Most recently, massacres, ethnic cleansing and acts of genocide have been carried out either in the name of religion or as a result of the victims' religious identity.

29. Religion or belief can generally be implicated in violent extremism in two ways. First is the use of violence in the name of religion, either in a targeted or indiscriminate manner. This may include coercive acts in, or related to, the private sphere, such as "honour" killings. Second is a recourse to violence as a manifestation of collective religious hatred against persons targeted because of their religious or belief identity. In practice, the two kinds of violence frequently overlap.

30. Violence in the name of religion or belief is perpetrated by way of indiscriminate or targeted attacks on individuals or communities. They involve suicide attacks, repression and other forms of institutional and structural violence. The majority of these acts target local persons or institutions, but it has become increasingly commonplace in recent years to use violence in the name of religion or belief in local, everyday places of daily life to send messages around the world (see A/HRC/28/66).

31. In some countries, armed groups invoke religion to justify atrocities such as targeted mass killings, extrajudicial and summary executions, enforced disappearances, torture, sexual violence, indiscriminate attacks against civilians, mass expulsions, enslavement or the systematic destruction of certain communities. In other countries, vigilante groups harass religious or belief minorities by vandalizing cemeteries and places of worship, grabbing lands or properties and threatening their security (see A/68/268 and A/HRC/22/51).

32. To be clear, violent extremism is not confined to any particular religion or region; many religions have been invoked by State and non-State actors, in both the global north and the global south, to justify violence in its various forms. Acts of violent extremism might also be carried out with equal vigour in the name of left- and right-wing or other political ideologies whose followers steadfastly adhere to extremist violence to advance non-religious, atheist and secular political agendas. These actors have historically sought to exploit weak Governments and fractious conditions by capitalizing on people's sense of grievance — real or perceived — to galvanize them towards supporting or perpetrating violent acts.

33. Those targeted by advocates of violence see violent extremism as a means to better address their grievances or meet other needs based on their formative and everyday experiences. However, the path whereby an individual comes to perceive terrorist violence as a possible course of action is unclear. Studies undertaken so far demonstrate that, despite an identifiable set of common "push" and "pull" factors, the pathways from holding extreme views that lead to carrying out acts of terrorism are non-linear and unpredictable, and "triggers" of violent action are individualized (see A/HRC/31/65).

34. Moreover, the particular identity of these actors is neither emblematic of violent extremism nor does it define the nature of the ideology the perpetrators claim to espouse, even if that ideology may be considered radical. In addition, the fact that some individuals incite discrimination, hostility or violence is not an indication that a religious or belief community shares these views or condones violent activities. In this regard, as already noted, the acts of individual members of religious communities should be associated with the person in question rather than with the community and other members generally.

35. Violence in the name of religion or belief predominantly targets persons belonging to religious or belief minorities, including converts, humanists, atheists and agnostics who suffer from a climate of intimidation, repression or violence, globally

(see A/67/303, para. 15). However, such violence can also affect the dissident followers of the very same religion or belief, which may also be the majority religion in whose name such acts are perpetrated. The victims of these violent acts could also include a variety of other groups, including adherents to different indigenous beliefs and the followers of small or new religious movements, which are often stigmatized as "sects" or "cults". People suspected of undermining "national cohesion" are also frequent targets of violent manifestations of intolerance, and unfortunately the voices of moderation who actively oppose the abuse of their religion to justify violence and bigotry bear an increased risk of being accused of betrayal or blasphemy, which frequently incurs retaliatory penalties. Moreover, a climate of impunity can further aggravate these situations.

36. Furthermore, the gender dimension of these violent acts is evident in the harmful practices that are carried out in the name of religion or belief or tradition against scores of women and girls who are the victims of "honour" killings, acid attacks, amputations, floggings and other violent practices. Women and girls also disproportionately suffer from sexual violence such as rape, virginity testing, sexual enslavement, female genital mutilation, early and forced marriage, marriage by abduction and widowhood rituals — often in conjunction with forced conversion or other cruelties. Many of these acts of violence occur in the "private sphere" and are not perceived through a lens of security or public safety.

37. Homophobic and transphobic violence against persons on the basis of their sexual orientation and gender identity are also being perpetrated in the name of religion, both by private actors and State agents. Those perceived to be lesbian, gay, bisexual or transgender have been subjected to brutal actions following discovery or acknowledgement of their sexual orientation and gender identity, including gang rapes, so-called "curative" rapes and family violence (see A/HRC/14/22/Add.2, paras. 38–89). The gender dimension of violent extremism can also manifest itself in other ways, such as when violent groups leverage the stereotype that women and girls are unlikely to carry out violent acts as a tactic to better ensure that their plans go unhindered or when women and girls are forced into sexual slavery.

38. The use of violence in the name of religion has led many to be suspicious of all or certain religions, and to view religion as a threat to peace and harmony, arguing that religion unconfined to private life results in religiously motivated political struggles, conflict and violence, which are sources from which certain forms of terrorism draw their motivation. Others have argued that there is an actual link between some religious doctrines and acts of terrorism. Regrettably, the fact remains that even though religion or belief does not explicitly incite terrorism, there are people who are convinced it is legitimate, even necessary, to kill in the name of their faith or beliefs.

## C. Reconciling the public and private dimensions of religion or belief

39. Although States are obligated under international law to support the right of everyone to hold a religion or belief, difficulties often arise when individuals choose to express their convictions, whether by organizing themselves as a religious or belief group or acting in accordance with the precepts of their religion or belief. While it is established that any restriction of the manifestation of religion or belief must strictly meet the limitations regime prescribed by international law, the precise extent of such limitations in specific circumstances has become a salient topic in many countries.

40. Controversies following the debates about whether the construction of minarets could be banned and ongoing conversations in numerous countries about whether people should be allowed to wear religious symbols in their places of education or

work, or indeed in public places, illustrate the complexities and pressing nature of questions regarding the scope and limitations of freedom of religion or belief. On the one hand, some secularists have strongly advocated that manifestations of religion should be restricted to the private sphere in order to maintain a "neutral" space in which all persons, of all origins and beliefs, can be treated equally. Others argue that everyone should be allowed to manifest their religion or belief freely, in accordance with their rights as enshrined in international human rights norms and standards, and highlight the uneven impacts that facially neutral laws have on different faith-based communities. The Special Rapporteur reiterates that any and all such restrictions on the manifestation of religion or belief must strictly comply with the limitations regime specified under international human rights law, and must be based on clear evidence.

41. The need to protect public safety and public order is of course clear. The danger, however, is that a State may use such an excuse to limit the rights of persons belonging to a religion or belief community that it finds inconvenient, and some have taken the public safety and order limitation to mean "public interest restrictions". In many cases, such limitations in the public's interest have been extended to promote a restrictive form of secularism.

42. Moreover, it is not always possible to separate conscience-based commitments and acts of religion or belief from faith or internal belief systems, particularly when deciding on issues concerning the right to "act" in accordance with one's religion or belief. That is, faith-based commitments cannot always be contained within the private sphere. For some, their religion or belief is a way of life, and certain precepts are understood to be enjoinments to public expression of religion or belief. Furthermore, values based on religion or belief often dictate standards of social conduct and responsibility that require individuals to act accordingly. In other words, for many there is a strong interrelationship between their beliefs and their way of life.

43. In recognition of this premise, the *forum internum* enjoys unqualified protection under international law. However, the underlying philosophy of several programmes to prevent and counter violent extremism attempt to place limitations on *forum internum* (which is an absolute, non-derogable right) vis-à-vis religious expression (which is not an absolute right). The Special Rapporteur notes that attempts to "police" the internal sphere may amount to indirect coercion in matters of religion or belief and may violate the absolute prohibition against intrusion in the *forum internum*.

## D. Reconciling freedom of religion or belief and other rights

44. The exercise of freedom of religion or belief is dependent on the enjoyment of other human rights. These include freedoms of expression, peaceful assembly, association and movement, the rights to privacy and equality before the law, education, the highest attainable standard of health and many more. Freedom of religion or belief achieves its full meaning only in the broad context of human rights. Indeed, many aspects of freedom of religion or belief have little or no meaning if other human rights are not effectively secured. At times, this can result in competing claims between the right to freedom of religion or belief and other human rights, or between religious and secular interests.

45. While national security is not, as already noted, included in article 18, paragraph 3, of the International Covenant on Civil and Political Rights as a legitimate ground for limiting the manifestation of religion or belief, public safety is, and given the broad scope of activities that could be perceived to act as a threat to public safety, "there is a risk that States will cite them to justify restrictions on [freedom of religion or belief] imposed for reasons tantamount to national security

interests, by arguing that a [religious or belief] group is engaged in political activities that endanger public safety and order".[16]

46. Moreover, specific limitations based on national security concerns are permissible in relation to freedom of expression, subject to their compliance with the limitations regime stipulated by international human rights law.[17] Such restrictions have also been used to indirectly restrict freedom of religion or belief, trying to circumvent the safeguards that exist to protect it. For instance, the criminalization of vaguely defined types of speech such as "hate speech"[18] risks the arbitrary application of such laws to issues related to religion or belief. The consequences of arbitrarily criminalizing some forms of speech with a religious element as "hate speech" can result in severe consequences, even potentially leading to imprisonment for non-violent acts. Application of the law in this way, therefore, results in an indirect discrimination against one's right to freedom of religion or belief. This includes laws criminalizing apostasy and blasphemy, which may not only constitute restrictions to freedom of religion or belief, but also infringe on the right to freedom of expression.[19]

**Anti-apostasy/anti-blasphemy laws**

47. Shorn of direct links to acts of violence, the tendency to characterize certain manifestations of religion or belief as "extremist" or a "threat to public order" include the activities of missionaries or others who seek new converts to their faith. Laws on apostasy or blasphemy, which are often framed as "anti-incitement legislation", exist in at least 69 States, and reflect the idea that the expression of certain views within a society may create "discontent", subvert "national unity" or undermine public order and public safety (see A/72/365, para. 27). In some jurisdictions, anti-terrorism legislation targets newer religious communities and is being used to generate cases of alleged blasphemy offenses in counter-terrorism courts.

48. The role that the Internet has played in the recruitment or radicalization of individuals has led many States to adopt a combination of repressive legislative measures to block, filter and ban specific content or entire websites. Security considerations are often claimed as the legal basis for the existence and implementation of such laws and actions. Despite the argument of some States that the intended goal of such laws is the improvement of "social harmony" as well as safeguarding security, in actual fact such measures often undermine the safety and equality of individuals adhering to different faiths (ibid.). In some cases, mechanisms have been set up to identify and refer content to Internet and social media companies for removal.[20] In other cases, anti-blasphemy and anti-apostasy laws are used to prosecute opinions or beliefs expressed in online forums.

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[16] Donna Sullivan, "Advancing the freedom of religion or belief through the United Nations Declaration on the Elimination of Religious Intolerance and Discrimination", *American Journal of International Law*, vol. 82, No. 3 (1988).

[17] Article 19, *The Johannesburg Principles on National Security, Freedom of Expression and Access to Information* (London, 1996). Available at www.article19.org/data/files/pdfs/standards/joburgprinciples.pdf.

[18] International law permits the criminalizing of hate speech only where it amounts to incitement to discrimination, hostility and violence, as stipulated in the International Covenant on Civil and Political Rights, art. 20, para. 2.

[19] Human Rights Committee, general comment No. 34 (2011) on the freedoms of opinion and expression, para. 48.

[20] See, for example, European Union Agency for Law Enforcement Cooperation (Europol), "Internet referral unit to combat terrorist and violent extremist propaganda", press release, 1 July 2015.

49. Since 2012, accusations of online blasphemy have risen, and new threats and patterns of violence have emerged.[21] Individuals using the Internet to disseminate views considered blasphemous are increasingly facing arrest and prosecution. The arrests are often capricious, creating an atmosphere of fear in which Internet users are unsure of the boundaries within which their rights can be exercised. Alarmingly, online speech, usually expressed through social media websites, can also lead to offline mob violence (ibid., para. 31). The securitization of online activity has provided a wide margin of operation for national authorities without proper scrutiny.

50. One particular case is that of a blogger who has been imprisoned since January 2014 after being convicted of apostasy for criticising caste-based discrimination.[22] Similarly, in 2015 a court sentenced a poet to death for apostasy stemming from his reportedly obscene comments about religious figures and the State, but also for passing around a book he wrote that promoted atheism and unbelief.[23] There is also an intrusion of national security concerns into this specific field, which is illustrated by the fact that some apostasy trials are conducted in the same manner as trials regarding threats to national security.[24] There are also cases where people are charged under anti-blasphemy laws (even for activities on social media and/or for engagement in conversations on a social network) and such trials are conducted in counter-terrorism courts.

51. The Special Rapporteur notes that any effort to prevent terrorist radicalization on the Internet (such as regulating, filtering or blocking online content deemed to be illegal under international law) should follow international human rights standards so as to avoid unlawfully impacting on the freedom of expression and the free flow of information. As stressed by the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye, content restrictions must always meet the tests of legality, necessity, legitimacy, proportionality and non-discrimination, and must be subject to due process (see A/HRC/38/35, para. 66). These measures should not be used to target dissent and critical speech.

52. Governments have also focused on groups and individuals that exploit freedom of expression by spreading messages of intolerance that do not meet the threshold of incitement to discrimination or violence according to article 20, paragraph 2, of the International Covenant on Civil and Political Rights, but that do merit condemnation (see A/HRC/22/17/Add.4, appendix, para. 20). This includes speech that is not a direct call for action but establishes the ideological basis for violent action. These States have sought to adopt new legislation to criminalize "extremist" speech that does not amount to incitement by creating offences that include "advocating" terrorism, the direct or indirect "inducement", "encouragement" or "glorification" of terrorism, or lending material support to terrorism. Others have converted previously civil offences into criminal ones (see A/HRC/31/65). What these new offences have in common are their propensity to deem criminal liability on the basis of the content of a person's speech, rather than the speaker's intentions or contextual assessments of the likelihood or occurrence of violence. The Human Rights Committee has highlighted that offences of "praising", "glorifying" or "justifying" terrorism must be

[21] See Joelle Fiss, "Anti-blasphemy offensives in the digital age: when hardliners take over", analysis paper, No. 25 (Washington, D.C., Brookings Institution, 2016).

[22] Office of the United Nations High Commissioner for Human Rights (OHCHR), "UN experts urge immediate release of detained Mauritanian blogger", 8 May 2018. Available at www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23050&LangID=E.

[23] See OHCHR, "SAU 10/2015". Available at https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=21775.

[24] Department of State, United States of America, "2008 Human rights report: Iran", 25 February 2009. Available at www.state.gov/j/drl/rls/hrrpt/2008/nea/119115.htm.

clearly defined to ensure that they do not lead to unnecessary or disproportionate interference with freedom of expression.[25]

**Policing religious literature**

53. Some States have also adopted measures to address concerns that some religious publications (both online and off), including sacred texts, may constitute a threat to peace and security. Some of these States rely on the assessments of Government-appointed "experts" to review religious literature and determine whether or not such material promotes "extremist" or doctrinally unsound views. In the light of such evaluations, States may decide to ban or censor certain religious materials or prohibit their distribution.

54. Justifications for such measures might argue that the text incites violence or contains violent imagery or language, or that the religious or belief community in question claims that their faith is the only path to salvation and truth, which can pose a threat to public order. Religious literature is an aspect of religious expression and therefore equally protected both by freedom of opinion and expression as well as by freedom of religion or belief; any interference with their production or dissemination can constitute a violation of these fundamental freedoms and must be strictly justified in line with the criteria set out in article 18, paragraph 3, and article 19, paragraph 3, of the International Covenant on Civil and Political Rights.

55. Moreover, the appointment of State "experts" to determine "authentic" interpretations of foundational texts of religions of beliefs can be problematic for several reasons. It may amount to a paternalistic interference in the right of individuals to determine for themselves how to engage peacefully with religious and philosophical beliefs, and it is contrary to the obligation of States to be an impartial guarantor of the rights to freedom of religion or belief of all persons within their jurisdictions. It may also violate the collective dimension of freedom of religion or belief, which includes doctrinal autonomy. State-sponsored interpretations of religion or belief are frequently associated with acts of intolerance.

## V. Mobilizing freedom of religion or belief to promote societal resilience against violent extremism

56. A growing body of scholarship highlights the role that freedom of religion or belief plays in promoting pluralistic societies which can sustain democratic governance based on the rule of law and respect for human rights, and its contribution to creating environments of mutual respect, tolerance and understanding among people of different religions, beliefs and cultures.[26] Environments in which the right to freedom of religion or belief is promoted and protected often foster safe spaces wherein hateful, violent narratives can be openly challenged. Moreover, freedom of religion or belief can advance peaceful coexistence and sustain societal cohesion, which are essential to public order, safety and long-term security. Individuals responsible for meeting security needs should engage with and listen to those who

[25] Human Rights Committee, general comment No. 34 (2011) on the freedoms of opinion and expression, para. 46.

[26] See Faiza Patel and Amrit Singh, "The human rights risks of countering violent extremism programs". See also Anthony Gill and Timothy Shah, "Religious freedom, democratization, and economic development: a survey of the causal pathways linking religious freedom to economic freedom and prosperity and political freedom and democracy", paper presented at the Annual Meeting of the Association for the Study of Religion, Economics, and Culture, Washington, D.C., 13 April 2013. Available at www.asrec.org/wp-content/uploads/2015/10/Gill-Shah-Religious-freedom-democratization-and-economic-development.pdf.

exercise agency with regard to freedom of religion or belief, as well as actors involved with promoting civil liberties.

57. In this spirit, United Nations engagement with regard to promoting respect for freedom of religion or belief has focused on eliminating intolerance and discrimination on the basis of religion or belief[27] and has spawned a number of initiatives that address concerns related to the advocacy of religious hatred and mass atrocities. Of particular relevance are measures to combat intolerance, negative stereotyping, stigmatization, discrimination, incitement to violence and violence against persons based on religion or belief (see Human Rights Council resolution 16/18). Likewise, initiatives developed in the context of mass atrocity prevention, and which are grounded in international human rights law, can also play a useful role in strengthening societal resilience against violent extremism. These activities identify specific roles and practical measures not just for Governments, but also for civil society and faith-based actors. However, while their relevance to the wider international strategies for countering terrorism has been recognized by the Secretary-General's Plan of Action to Prevent Violent Extremism,[28] care must be taken not to securitize dialogue and engagement with religious or belief actors or to instrumentalize these initiatives for objectives related to preventing and countering violent extremism.

58. Developing collaborative networks of faith-based actors to promote human rights is clearly a worthy goal, especially with regard to fostering respect for pluralism. In many cases, religious organizations themselves provide the best hope of spreading the message of tolerance and reconciliation that will help ensure an individual's right to practice her or his religion in peace in whatever country she or he resides. However, care must be taken to ensure that such approaches are inclusive and accessible to all, without discrimination with regard to any protected characteristic. It is also important to ensure that such collaborative networks commit to the rights and freedoms enshrined in international human rights law. Failure to do so might contribute to reinforcing various stereotypes and forms of intolerance.

## A. Human Rights Council resolution 16/18 and the Istanbul Process

59. The Istanbul Process for Combating Intolerance, Discrimination and Incitement to Hatred and/or Violence on the Basis of Religion or Belief, which has been facilitating, since 2011, the implementation of the agenda identified in Human Rights Council resolution 16/18, has been endorsed by human rights experts as "a promising platform for effective, integrated and inclusive action by the international community" (see A/HRC/22/17/Add.4, appendix, para. 41). The resolution identifies a comprehensive, action-oriented strategy that comprises a mix of legal, policy and administrative measures as well as outreach programmes to promote equality, pluralism, participation, understanding and community cohesion and resilience.

60. Although the Istanbul Process is not generally regarded as a tool to prevent and counter violent extremism, some of the early activities that were implemented under its framework, particularly the training of law enforcement officials in detecting and responding to incitement, clearly bear out the relevance of the Istanbul Process to efforts to prevent and counter violent extremism. Likewise, the most recent meeting of the Istanbul Process, held in Singapore in July 2016, identified practical community-based projects that fostered societal cohesion and resilience against

[27] Marc Limon, Nazila Ghanea and Hilary Power, "Fighting religious intolerance and discrimination: the United Nations account", *Religion and Human Rights*, vol. 11, No. 1 (April 2016).

[28] See, for example, paras. 36 and 49.

advocacy of hatred. However, most of the other meetings held under the auspices of the Istanbul Process focused more on normative contestation and politicization and externalization of concerns, rather than a practitioner-focused, introspective engagement across a wide range of stakeholders.

61. Amid rising intolerance and concerns about the negative impacts of some activities to prevent and counter violent extremism, the Special Rapporteur recommends that States revitalize the Istanbul Process at a practitioner level, aimed at learning from best practices and fostering introspection and collaboration on capacity-building. The added value of the Istanbul Process is its usefulness as a guide for States to promote religious pluralism while mitigating some of the negative side effects of policies to prevent and counter violent extremism and fostering long-term cohesion.

## B. Rabat Plan of Action

62. Another related and important soft law standard is the Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence (see A/HRC/22/17/Add.4, appendix), which was adopted by experts at a meeting in Rabat in October 2012. The Special Rapporteur and his predecessor have outlined the importance of the Rabat Plan of Action in addressing advocacy of religious hatred that constitutes incitement to violence, discrimination and hostility (see A/HRC/25/58, A/HRC/28/66, A/HRC/31/18, A/HRC/34/50 and A/72/365). It provides practical guidance through a six-part test that takes into account the context of the statement, the speaker's position and intent, the content and extent of the speech and the likelihood that the speech would incite action against the target group (see A/HRC/22/17/Add.4, appendix, para. 29). This test is being used by the national authorities for audiovisual communication in Côte d'Ivoire, Morocco and Tunisia (see A/HRC/37/3, para. 69), and the European Court of Human Rights also referred to the Rabat Plan of Action in a recent judgment.[29]

63. In a thematic resolution, the Human Rights Council called for the international community's effective implementation of resolution 16/18, the Istanbul Process and the Rabat Plan of Action "in order to contribute to a more conducive environment to countering hate speech and violence" (see Human Rights Council resolution 34/8). Similarly, in a country-specific resolution, the Human Rights Council encouraged the Government of Myanmar to increase further efforts to promote tolerance and peaceful coexistence in all sectors of society in accordance with Council resolution 16/18 and the Rabat Plan of Action (see resolution 34/22). In his July 2018 update on the situation of human rights of Rohingya people, the High Commissioner for Human Rights referred to resolution 16/18 and the Rabat Plan of Action, as well as to the Beirut Declaration on Faith for Rights and its 18 commitments (see below), in order to address advocacy of hatred that incites violence, discrimination or hostility, particularly when it is conducted in the name of religion or belief.[30] This illustrates the complementarity and practical usefulness of these soft law standards.

[29] European Court of Human Rights, *Case of Mariya Alekhina and Others v. Russia*, paras. 110, 187, 190–191 and 223. See also the separate opinion of Judge Elósegui, para. 14.

[30] See A/HRC/38/CRP.2, para. 4. Available at www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session38/Pages/ListReports.aspx.

## C. Plan of Action for Religious Leaders and Actors to Prevent Incitement to Violence that Could Lead to Atrocity Crimes

64. Building on the Rabat Plan of Action, a process was initiated in April 2015 to assess the specific role that religious leaders and actors can play in preventing incitement to violence that could lead to atrocity crimes (i.e., genocide, war crimes and crimes against humanity). In July 2017, the Plan of Action for Religious Leaders and Actors to Prevent Incitement to Violence that Could Lead to Atrocity Crimes (the Fez Plan of Action) was launched with recommendations that address three broad themes, including those which: (a) aim to prevent incitement to violence, including violent extremism and gender-based violence; (b) strengthen tools to prevent such incitement; and (c) reinforce the conditions conducive to preventing incitement to violence by fostering peaceful, inclusive and fair societies and by implementing international human rights standards.[31] Recommendations offered to faith leaders and actors by the Fez Plan of Action can also contribute to the prevention of incitement to violent extremism by encouraging these actors to confront ideologies that promote violent extremism and terrorism; address topics that religious extremists monopolize, including through the provision of accurate and nuanced viewpoints; provide counternarratives to those attracted by or who are part of violent extremist and terrorist groups; and build the resilience of communities, and of youth in particular, to violent extremism. Notably, it recommends implementing a holistic approach to preventing violent extremism rather than a security-based approach.[32] In addition to the Rabat Plan of Action, the Fez Plan of Action should be read in conjunction with the Framework of Analysis for Atrocity Crimes, which can add value to strategies to prevent and counter violent extremism through its insights on risk factors and building societal resilience.[33]

## D. The Secretary-General's Plan of Action to Prevent Violent Extremism

65. The Secretary-General outlined his Plan of Action to Prevent Violent Extremism in December 2015, calling on States to firmly anchor their strategies, policies and actions in the four pillars of the United Nations Global Counter-Terrorism Strategy. He noted the central importance of respecting human rights in preventing violent extremism and highlighted contextual and background factors such as the absence of the rule of law, poverty, deprivation, discrimination, unresolved conflicts and disregard for human rights as factors which can amplify the receptiveness of target audiences to violent extremist narratives. While the Secretary-General noted that definitions of "terrorism" and "violent extremism" are the prerogative of States, he stressed that such definitions must be consistent with States' obligations under international law, in particular international human rights law (see A/70/674, para. 5). He identified a range of actions that the international community, States and non-State actors could take to prevent violent extremism.

66. One of the action points identified by the Secretary-General was to "engage religious leaders to provide a platform for intra- and interfaith dialogue and

[31] United Nations, *Plan of Action for Religious Leaders and Actors to Prevent Incitement to Violence That Could Lead to Atrocity Crimes* (World Council of Churches, Network for Religious and Traditional Peacemakers, Kaiciid Dialogue Centre). Available at www.un.org/en/genocideprevention/documents/Plan_of_Action_Religious_Prevent_Incite.pdf.

[32] Ibid., p. 18.

[33] United Nations, "Framework of analysis for atrocity crimes: a tool for prevention" (New York, 2014). Available at www.un.org/en/genocideprevention/documents/publications-and-resources/Framework%20of%20Analysis%20for%20Atrocity%20Crimes_EN.pdf.

discussions through which to promote tolerance and understanding between communities, and voice their rejection of violent doctrines by emphasizing the peaceful and humanitarian values inherent in their theologies" (ibid., para. 49 (e)). He further recommended the use of the Rabat Plan of Action in support of a comprehensive approach to addressing issues of incitement and violent extremism (ibid., para. 50 (i)).

### E. "Faith for Rights" framework

67. The "Faith for Rights" framework, which was launched in March 2017 through the Beirut Declaration on Faith for Rights and its 18 commitments,[34] highlights that religious leaders are potentially very important human rights actors in view of their considerable influence on the hearts and minds of hundreds of millions of believers. The underlying rationale is expressed in the commitment to "leverage the spiritual and moral weight of religions and beliefs with the aim of strengthening the protection of universal human rights and developing preventative strategies".[35]

68. The undertaking expressed in the Beirut Declaration to enhance cohesive, peaceful and respectful societies by mobilizing faith-based actors behind the human rights framework is particularly well illustrated by the commitments to: support and promote equal treatment in all areas and manifestations of religion or belief; ensure non-discrimination and gender equality; stand up for the rights of all persons, including those belonging to minorities; publicly denounce all instances of advocacy of hatred that incite violence; refrain from oppressing critical voices or giving credence to exclusionary interpretations on the basis of religious grounds; and condemn judgmental public determinations by any actor who in the name of religion aims to disqualify the religion or belief of another individual. The holistic human rights approach of the "Faith for Rights" framework is further expressed in the commitment to defend the freedom of expression, including academic freedom and the promotion of tolerance through formal education channels. It also emphasizes the important role of parents and families in detecting and addressing early signs of vulnerability of children and youth to violence in the name of religion.

## VI. Conclusions and recommendations

69. **Terrorism and violent extremism pose direct threats to the enjoyment of human rights, ranging from the right to life and the right to liberty and security of person to freedom of expression, association and thought, conscience and religion. States have an obligation to protect from violence all individuals within their territories and subject to their jurisdictions. However, the failure to uphold human rights obligations while pursuing these measures has also caused an alarming uptick in human rights violations, including undue restrictions on freedom of religion or belief.**

70. **Over the past two decades, United Nations experts, human rights organizations, religious leaders and activists, as well as counter-terrorism specialists, have raised serious concerns about the inverse relationship between ill-defined security measures and the protection of human rights, demonstrating the detrimental impact that measures to counter terrorism or prevent violent extremism have had on the enjoyment of the freedom of religion or belief and the**

[34] OHCHR, *Faith for Rights* (Geneva, 2018). Available at www.ohchr.org/Documents/Press/Faith4Rights.pdf.

[35] OHCHR, "18 commitments on 'Faith for Rights'", commitment XVI. Available at www.ohchr.org/Documents/Press/21451/18CommitmentsonFaithforRights.pdf.

fundamental freedoms on which this right depends. The paradox, as researchers have stressed, is that in many places denying freedom of religion or belief has resulted in less order and more violence. It seems, they note, that that there is a correlation between restrictions on freedom of religion or belief and increases in conflict and violent religious persecution, and that it is not pluralism that threatens public order, but rather attempts to repress it that breeds the conditions for conflict.

71. In line with the commitment to advance a human rights approach when preventing violent extremism, it will be important for States to ensure that they fully discharge their obligation to respect, protect and promote the right to freedom of religion or belief if they are to make inroads in fulfilling national security needs. However, the implementation of these obligations should not be seen as arising primarily from their instrumental value in preventing violent extremism. Rather, they should be viewed as compulsions informed by the normative and legal obligations incumbent upon States.

72. In recognizing the inadequacies of counter-terrorism responses enacted at the start of the millennium to address rising acts of violent extremism, a shift in the approach taken by the United Nations towards combating these phenomena has developed over the past decade (see A/70/371, para. 14, and Security Council resolution 2129 (2013), para. 19). This change was, in part, designed to move away from a narrow, security-oriented approach to combating ideologically motivated violence towards a more "holistic" strategy aimed at engaging with and addressing the varied drivers of violent extremism and terrorism as preventive measures.

73. While noting the importance of preventing violent extremism, and further stressing that such an approach must remain a priority, the Special Rapporteur, contends that the goal of bringing the reach and expertise of a variety of societal actors to bear on the development and implementation of preventive strategies has been undermined. Many of the institutions and processes maintained and promoted by these actors have been co-opted at the national level — essentially rendering them the "eyes and ears" of security apparatuses, rather than guides in a broader approach to countering an existential threat. Strategies to prevent and counter violent extremism that seek to engage whole societies in fostering resilience against intolerance and violent extremism risk failing if they become a back door through which an increasing range of socioeconomic sectors, cultural activities and ethnic and religious communities are viewed through a security lens. The corresponding result could be counterproductive, undermining social cohesion, alienating communities, diminishing trust and possibly aggravating some of the drivers of violent extremism.

74. Furthermore, while security and the enjoyment of human rights are mutually reinforcing, the manner in which this synergy is obtained is not by subjecting freedom of religion or belief and other human rights to a security test or a utility analysis, but by ensuring that legitimate concerns about national security and public safety are pursued within the regime of limitations and derogations provided for by the United Nations human rights framework. This regime identifies exhaustive grounds and specific criteria for limitations and permissible scope for derogations. The perception that security needs cannot be met while respecting human rights, including the broad constellation of rights related to the exercise of the right to freedom of religion or belief, may amount to negating the human rights framework and could imperil the foundation of peace, freedom and justice in the world.

75. International human rights law stipulates that any distinction, exclusion or preference that, by design or in its application, nullifies or impairs the enjoyment of human rights and fundamental freedoms is unlawful unless distinctions are based on objective and reasonable criteria. Therefore, restrictions imposed on the rights of persons belonging to religious or belief communities, such as the ability to disseminate religious teachings, construct and maintain places of worship or communicate with co-religionists across borders, or that curtail freedoms of movement and association or the right to privacy, must meet the above-mentioned tests. Such restrictive measures must further be subject to accountability, including judicial oversight and access to remedy. It is when these conditions are met that the synergies between human rights and security will be better realized and religion or belief can contribute to building resilience against violence in the name of religion.

76. The Special Rapporteur asserts that, where freedom of religion or belief and the range of rights on which it depends are respected, the space and scope for counternarratives to be effective against intolerant messages increases. Measures such as awareness-raising, education and interreligious communication and intra-faith dialogue can more broadly play a positive role in countering hateful narratives and ideologies and combating religious discrimination and hatred, thereby ensuring security. The above approach requires a larger methodological framework with a consistent human rights-based approach. The Special Rapporteur therefore intends to promote a discussion among interested stakeholders in order to develop a manual for faith-based actors that allows them, in their respective environments and in an adaptive manner, to counter hateful narratives and to illustrate how faith(s) can contribute to human rights.

77. Given the role that religious or belief interpretations and identity play in violent extremism, States must focus on strengthening respect for freedom of religion or belief in accordance with the international legal framework. International human rights law does not protect every act motivated by religious conviction and in fact notes that freedom of religion or belief cannot be invoked to destroy any of the other rights guaranteed by the human rights framework. Moreover, the right to freedom of religion or belief includes a right to non-discrimination and equality.

78. The Special Rapporteur would like to reiterate the recommendations made by the High Commissioner for Human Rights, and by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, to ensure vigilant action by States to protect from violence all individuals within their territories and those subject to their jurisdictions, while fully respecting international human rights law; undertake further research on the phenomenon of radicalization; pursue evidence-based policies that meet the human rights obligations of States; and ensure a gendered perspective that complies with the duty to respect, protect and promote the human rights of women, children and sexual minorities.

79. The Special Rapporteur specifically calls upon States to:

(a) Recognize the utility of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief adopted by the General Assembly in 1981 as a guide in preventing violent extremism and, in this context, especially respect and protect the freedoms enumerated in article 6 of the Declaration;

(b) Implement fully the action plan detailed in paragraphs 5 and 6 of Human Rights Council Resolution 16/18 in the interests of fostering pluralism,

**inclusion and societal cohesion, comply with the reporting requirements under the resolution and convene the seventh meeting of the Istanbul Process as a mechanism to exchange information on good practices and promote the implementation of the action plan;**

**(c) Operationalize the call in the Secretary General's Plan of Action to Prevent Violent Extremism to promote engagement with religious leaders and faith-based actors and, in this context, invest in the dissemination and implementation of the Rabat Plan of Action, the Beirut Declaration on Faith for Rights and the Fez Plan of Action, which provide a chart of specific commitments as well as a number of practical measures to address the related phenomena of incitement to religious hatred, discrimination and violence;**

**(d) Develop national action plans, with the participation of national human rights institutions, civil society organizations and development partners, to facilitate the implementation of the specific roles contained in the aforementioned tools for national and international actors, including the mass media, judicial authorities, oversight bodies, civil society, religious leaders and faith-based actors.**

**80. The Special Rapporteur also calls upon the respective United Nations mechanisms to facilitate transparency in the implementation by States of Human Rights Council resolution 16/18 and of the steps taken by key stakeholders to operationalize the Rabat Plan of Action, the Fez Plan of Action and the Beirut Declaration and its 18 commitments, and to support the convening of the seventh meeting of the Istanbul Process.**

United Nations A/73/363

General Assembly

Distr.: General
5 September 2018

Original: English

**Seventy-third session**
Item 74 (c) of the provisional agenda*
**Promotion and protection of human rights: human rights situations and reports of special rapporteurs and representatives**

# Report of the Commission of Inquiry on Burundi

## Note by the Secretariat

The Human Rights Council, in paragraph 4 of its resolution 36/19 on the renewal of the mandate of the Commission of Inquiry on Burundi, requested the Commission to present a final report to the Council at its thirty-ninth session and to the General Assembly at its seventy-third session.

Pursuant to that request, the report of the Commission of Inquiry is contained in document A/HRC/39/63, submitted to the Council at its thirty-ninth session, to be held in September 2018.

* A/73/150.

18-14694 (E) 070918

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United Nations A/73/364

General Assembly

Distr.: General
5 September 2018

Original: English

**Seventy-third session**
Item 55 of the provisional agenda
**Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories**

# Applicability of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, to the Occupied Palestinian Territory, including East Jerusalem, and the other occupied Arab territories

## Report of the Secretary-General

*Summary*

The present report provides details of the efforts made to implement General Assembly resolution 72/85.

* A/73/150.

18-14669 (E) 070918

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1. The present report is submitted pursuant to resolution 72/85, by which the General Assembly requested the Secretary-General to report at its seventy-third session on the implementation of the resolution.

2. On 1 May 2018, the Secretary-General addressed a note verbale to the Government of Israel in which he requested information on any steps that it had taken or envisaged taking concerning the implementation of the relevant provisions of the resolution. No reply had been received at the time of the preparation of the present report.

3. In a note verbale dated 1 May 2018 sent to the permanent missions to the United Nations Office and other international organizations in Geneva of the High Contracting Parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, including the State of Palestine, the Secretary-General drew attention to paragraph 3 of resolution 72/85, by which all High Contracting Parties had been called upon, in accordance with article 1 common to the four Geneva Conventions and as mentioned in the advisory opinion of the International Court of Justice of 9 July 2004, to continue to exert all efforts to ensure respect for the provisions of the Convention by Israel, and requested information regarding any steps that the High Contracting Parties had taken or envisaged taking concerning the implementation of the resolution. At the time of the preparation of the present report, the Permanent Missions of Egypt, Ireland and the Syrian Arab Republic had responded to the note verbale.

4. In its note verbale dated 29 May 2018, the Permanent Mission of Egypt noted the continued efforts of the Government of Egypt to highlight, in regional and international forums, the obligations of Israel towards the Palestinian people. It also referred to its continued affirmation of the illegality of Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, in accordance with international law and relevant international resolutions.

5. Egypt also highlighted its reiteration of the special status of Jerusalem with regard to its engagement with regional and international organizations, in accordance with relevant international resolutions. It also stated that, in relevant international forums, the Government of Egypt had emphasized that no steps should be taken by Israel or any other State that could affect the legal status of the city or violate the religious rights of Palestinians, especially in the Aqsa Mosque.

6. Egypt urged Israel not to obstruct or hamper the work of the United Nations Relief and Works Agency for Palestine Refugees in the Near East, emphasizing that the General Assembly had acknowledged the need for the Agency by renewing its mandate in 2017. According to Egypt, this demonstrated the importance of the Agency in contributing to the stability of the situation of Palestinian refugees and of the host countries.

7. Egypt urged Israel to abide by its responsibilities regarding the Gaza Strip, demanding that Israel open all of the crossings between Israel and the Gaza Strip and end the siege imposed on Gaza.

8. Egypt noted that it had communicated with Israel, asking it to show restraint and urging it not to use force against peaceful protesters in Gaza during the Great March of Return protests, which began in March 2018. It further noted that it had been in contact with the Israeli authorities to facilitate the opening of the Karam Abu Salim crossing, in reaction to the announcement by Israel that the crossing would be closed until further notice as a result of the events of 14 May. Egypt noted that Israel had responded positively to its request and opened the crossing to allow the entrance of necessary aid and goods.

9. On 1 June 2018, the Permanent Mission of Ireland responded to the note verbale dated 1 May 2018 from the Secretary-General. Ireland first emphasized that the Government of Ireland did not recognize any transfer of sovereignty or annexation of Palestinian territory occupied by Israel in 1967, pending any agreement between the parties to the conflict. It also noted that the Government of Ireland had consistently affirmed that the establishment of Israeli settlements in the Occupied Palestinian Territory was in breach of international law.

10. Furthermore, Ireland indicated that, in July 2014, the Department of Foreign Affairs and Trade of Ireland had issued advice for Irish citizens and businesses warning of the risks involved in financial and economic activities in Israeli settlements in the Occupied Palestinian Territory.

11. On 24 May 2018, the Permanent Mission of the Syrian Arab Republic responded to the note verbale dated 1 May 2018 from the Secretary-General. It reaffirmed the support of the Government of the Syrian Arab Republic to General Assembly resolution 72/85 and once again called upon all Member States to accelerate its strict implementation. It further reaffirmed that the Geneva Convention relative to the Protection of Civilian Persons in Time of War applied to the Occupied Palestinian Territory, including East Jerusalem, and the other Arab territories occupied by Israel since 1967, including the occupied Syrian Golan.

12. The Syrian Arab Republic stated that the refusal of Israel to apply the Fourth Geneva Convention to the Occupied Palestinian Territory, including East Jerusalem, and to the other Arab territories occupied by Israel since 1967 constituted a rejection of the will of the international community. It stressed the need to put an end to the continued violations by Israel of its obligations under international law, including international humanitarian law.

13. The Syrian Arab Republic further noted that, over the 51 years of Israeli occupation of the Syrian Golan, and despite repeated demands in the form of resolutions reflecting the will of the international community that Israel end the occupation of the Syrian Golan, stop its daily oppressive practices against Syrian citizens under occupation and stop its flagrant violations of agreements and international standards, Israel had still not complied with these resolutions and international law. Furthermore, the Syrian Arab Republic stated that Israel continued its occupation of the Syrian Golan without any deterrent and benefited from protection from accountability provided by some permanent members of the Security Council.

14. The Syrian Arab Republic stressed that Israel must abide by the Fourth Geneva Convention and respect its application in all circumstances. It also highlighted the need for Israel to implement the resolutions of the Security Council, particularly resolution 497 (1981). The Syrian Arab Republic called upon Member States, particularly the parties to the Fourth Convention, not to recognize any legal status resulting from actions by Israel amounting to violations of the peremptory norms of international law. It further called upon Member States to refrain from providing any assistance to the Israeli occupation, especially with reference to commercial and tourist activities, noting that it would be used by Israel to perpetuate its occupation of the Syrian Golan and that supporting, in particular, the continuation of Israeli settlements and/or the establishment of new settlements would perpetuate the violations of human rights of Syrians in the region.

15. The Syrian Arab Republic noted that it completely rejected the decision of Israel to hold elections for the so-called local councils in the villages of the occupied Syrian Golan in October 2018, stating that the aim was to consolidate the annexation by Israel of the Syrian Golan. It stressed that the Golan was an integral part of the Syrian territory and should be returned. In identical letters dated 8 July 2017 addressed to

the Secretary-General and the President of the Security Council (A/71/980-S/2017/587), the Syrian Arab Republic called upon the United Nations and the international community to condemn these actions, noting that they flagrantly violated Security Council resolution 497 (1981) and would lead to a further deterioration of the situation in the region.

16. The Syrian Arab Republic reaffirmed its solidarity with its people in the Syrian Golan, noting that they also rejected the annexation of the territory and the decision to hold elections, as well as all previous decisions that the occupying Power believed could be taken amid the crisis that Syria had been experiencing for the past eight years.

17. The Syrian Arab Republic noted that, at a meeting held in Baku from 3 to 6 April 2018, the Movement of Non-Aligned Countries condemned all actions taken by Israel to change the legal, physical and demographic situation of the occupied Syrian Golan. The Movement also called upon Israel to abide by Security Council resolution 497 (1981) and to completely withdraw from the occupied Syrian Golan to the border of 4 June 1967, while also implementing Council resolutions 242 (1967) and 338 (1973).

18. The Syrian Arab Republic reiterated its position rejecting the policies of Israel in the Occupied Palestinian Territory, including East Jerusalem, and the occupied Syrian Golan, including any other party's attempt to consider settlements as a fait accompli. The Syrian Arab Republic added that settlements constituted a flagrant violation of international law, including international humanitarian law and relevant resolutions. It called upon the international community, including the parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War, to commit to exerting more concrete pressure on Israel to respect and abide by international legal standards as an occupying Power according to the provisions of the Fourth Convention and to dismantle all its illegally established settlements.

19. The Syrian Arab Republic emphasized that Israel continued to build the wall around the city of Jerusalem as part of its systematic policy to deny the Palestinian people their right to self-determination, despite the advisory opinion of the International Court of Justice affirming that countries were obliged not to recognize the legal status resulting from the construction of the wall in the Occupied Palestinian Territory, including East Jerusalem, and despite the relevant United Nations resolutions supporting that opinion. The Syrian Arab Republic emphasized the need to address the strategy of Israel to "Judaize" Jerusalem, including through continuous and dangerous aggressions against the city and its Islamic and Christian holy sites, and the increased rate of settlement activity in the Old City and the city as a whole. The Syrian Arab Republic described these efforts as part of a strategy to impose a settlement and colonial reality in completion of the plan to "Judaize" the city and encircle it with "the apartheid separation wall". The Syrian Arab Republic further emphasized the need to confront the efforts of Israel to separate Palestinian families in Jerusalem and expel Palestinian residents from the city.

20. The Syrian Arab Republic noted that the continued violation by Israel of the inalienable right to self-determination of the Palestinian people represented a violation of a right to which all were entitled. It stated that the international community was consequently obliged to require Israel to respect that right, as confirmed by the International Court of Justice in its advisory opinion regarding the wall.

21. The Syrian Arab Republic called upon the international community to take an immediate and firm stand to stop the "assassination" by Israel of Palestinians who peacefully protested against the violations committed by Israel, including intentional killings, the demolition of homes, the violation of the sanctuary of the Aqsa Mosque and all Muslim and Christian holy places and the continuing efforts to "Judaize" the city of Jerusalem.

22. The Syrian Arab Republic also requested the international community to uphold *erga omnes* obligations, as confirmed in the advisory opinion of the International Court of Justice, to ensure that Israel ends its occupation of the Occupied Palestinian Territory and other occupied Arab territories, including the Syrian Golan, returning to the borders of 4 June 1967; and to oblige Israel to implement the relevant United Nations resolutions that demand its withdrawal from those territories to the borders of 4 June 1967, and from the remaining occupied Lebanese territory; the establishment of an independent Palestinian State, with East Jerusalem as its capital; preservation of Palestinian sovereignty over Palestinian natural resources; and the release of Palestinian and Syrian prisoners from Israeli jails. The Syrian Arab Republic also called for the implementation of the right of return of Palestinian refugees expelled from their homes by force in 1948.

United Nations A/73/365

General Assembly

Distr.: General
5 September 2018

Original: English

**Seventy-third session**
Item 74 (b) of the provisional agenda*
**Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms**

# Report of the Special Rapporteur on the independence of judges and lawyers**

## Note by the Secretary-General

The Secretariat has the honour to transmit to the General Assembly the report of the Special Rapporteur on the independence of judges and lawyers, prepared pursuant to Human Rights Council resolution 35/11.

Bar associations play a vital role in the organization and safeguarding of the independence and integrity of the legal profession and its members. The underlying rationale for their creation is the need to provide a platform to allow the legal profession to carry out its legitimate activities without any external interference. Bar associations should meet, at a minimum, the following requirements: (a) independence; (b) a self-governing nature; (c) a general mandate to protect the independence of the legal profession and the interests of its members; and (d) recognition under law.

Bar associations have a crucial role to play in a democratic society to enable the free and independent exercise of the legal profession and to ensure access to justice and the protection of human rights, in particular due process and fair trial guarantees. They protect individual members of the legal profession, particularly in situations where they are not able to adequately defend themselves; elaborate and implement requirements and procedures to gain access to the legal profession; develop codes of professional conduct; and handle disciplinary proceedings against lawyers. Professional associations of lawyers also cooperate with State institutions in providing legal aid services to poor and disadvantaged persons and legal education and training to lawyers throughout their careers.

The report analyses various forms of interference with associations' independence, ranging from legal or administrative obstacles to prevent lawyers from establishing or joining independent professional organizations, to different forms of control by the executive or judicial branch on the entry into or continued practice within the legal profession, and threats of disciplinary action and intimidation against the members of bar associations.

* A/73/150.

** The present report was submitted after the deadline in order to reflect the most recent developments.

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On the basis of that analysis, the Special Rapporteur identifies a number of good practices to ensure the independence and effectiveness of bar associations and concludes the report with a list of recommendations on the establishment, composition and functions of those bodies.

# Report of the Special Rapporteur on the independence of judges and lawyers

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# I. Introduction

1. The present report is submitted in accordance with Human Rights Council resolution 35/11.

2. The report focuses on the essential role that bar associations play in a democratic society to enable the free and independent exercise of the legal profession and to ensure access to justice and the protection of human rights, in particular due process and fair trial guarantees.

3. In preparing the report, the Special Rapporteur called for contributions from States, bar associations and civil society. He requested information on the way the legal profession is organized and regulated at the national level; on the composition of bar associations and their relationships with other branches of power, in particular the executive branch and judiciary; on the role that bar associations play in the regulation of the legal profession; and on the criteria for admission to those associations.

4. At the time of writing, the Special Rapporteur had received a total of 40 responses. He wishes to convey his gratitude to all States and non-State actors that contributed to the preparation of the report, the annex to which contains a full list of respondents. All submissions are available on the website of the Office of the United Nations High Commissioner for Human Rights.

5. The Special Rapporteur would also like to thank the International Bar Association's Human Rights Institute and the Human Rights Clinic of the Human Rights Research and Education Centre of the University of Ottawa for its support in the preparation of the report.

# II. Overview

6. The right to have access to a lawyer constitutes an integral part of the right to a fair trial. Several international and regional human rights treaties include the right to be assisted by a lawyer of one's own choosing among the minimum guarantees due to every person charged with a criminal offence. That right has also been proclaimed in a large number of United Nations legal instruments, including the Basic Principles on the Role of Lawyers, which represent the most comprehensive international normative framework aimed at safeguarding the right of access to legal assistance and the independent functioning of the legal profession.

7. In order for legal assistance to be effective, it has to be carried out independently. That is recognized in the preamble to the Basic Principles, which states that the adequate protection of the human rights and fundamental freedoms requires that "all persons have effective access to legal services provided by an independent legal profession".

8. Since the establishment of the mandate, several Special Rapporteurs have highlighted the fact that professional associations of lawyers have a fundamental role to play in promoting and protecting the independence and the integrity of the legal profession and safeguarding the professional interests of lawyers (see A/71/348, paras. 30–33 and 80–88; and A/64/181, paras. 19–27).

9. Issues relating to the establishment, composition and functioning of bar associations have also been dealt with in a wide number of country mission reports (see, for example, A/HRC/32/34/Add.1, paras. 56–62, 66 and 81; A/HRC/29/26/Add.3, para. 85; A/HRC/29/26/Add.2, paras. 75–81; A/HRC/23/43/Add.1, paras. 90–95; and A/HRC/23/43/Add.2, paras. 87–94). During those missions, the mandate holder has

documented various forms of interference with the independence of bar associations, including: legal or administrative obstacles aimed at preventing lawyers from establishing or joining independent professional organizations (see paras. 34–36 below); vague legislation and policies on the admission to the legal profession (see paras. 54–61 below); legislation that restricts the scope or permissible activities of existing lawyers' associations or limits their self-regulatory power (see paras. 24–28 below); and legislative or regulatory measures to include Government-appointed members in the bar association's executive body (see paras. 39–40 below). On several occasions, mandate holders criticized the existence of State-controlled associations with compulsory membership, stressing that such associations seriously undermine the independence of lawyers (see A/64/181, para. 22).

10. The mandate holder has also addressed various forms of interference with the legitimate activities of bar associations in Human Rights Council special procedure communications. The most recurrent forms of interference include: disciplinary action (including disbarment) or administrative, economic or other sanctions against members of the executive body of the lawyers' association for actions taken in accordance with recognized professional duties, standards and ethics; arbitrary arrest, detention and prosecution of the presidents and members of bar associations; recourse to negative rhetoric against the bar association and its members; and inaccurate reporting on national and local press, including the identification of lawyers and their clients and attacks against lawyers as a category, depicting them as corrupt, dishonest and greedy.[1]

11. The present report aims at assessing the existing international and regional standards relating to bar associations or other lawyers' professional associations established at the national level to protect individual lawyers, and the independence of the legal profession in general. It does not aim at identifying an ideal model of bar association or providing a comprehensive analysis of the effectiveness of those institutions in protecting the independence of the legal profession. Based on the contributions received, the Special Rapporteur seeks to define the common principles for ensuring the independence of such bodies, where they exist, and to identify good practices relating to their mission, composition and functions.

## III. Legal standards

12. The Basic Principles recognize that lawyers, like other citizens, have the right to freedom of association and assembly (principle 23), which includes the right to form and join self-governing professional associations to represent their interests (principle 24). They also recognize the vital role that bar associations play in facilitating access to a lawyer and legal services (principles 3 and 4), promoting the continuing education and training of lawyers (principle 9), regulating non-discriminatory access to, or continued practice within, the legal profession (principle 10), protecting their members from persecution and improper restrictions and infringements (principle 25), adopting and enforcing codes of professional

[1] See, for example, communications OL AZE 1/2018, available from https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=23569; OL KAZ 1/2018, available from https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=23579; UA MDV 5/2017, available from https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=23342; JOL TUR 5/2017, available from https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=23138; and AL TJK 1/2015, available from https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=21961).

conduct (principle 26) and handling disciplinary proceedings against their members (principles 28 and 29).

13. At the regional level, the role, composition and functions of bar associations are dealt with in a number of recommendations, principles and guidelines. In October 2000, the Committee of Ministers of the Council of Europe issued its Recommendation No. R(2000)21 on the freedom of exercise of the profession of lawyer, which includes a specific provision on bar associations and their role in protecting the independence of the legal profession and its members against any improper restriction or infringement (principle V). The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, adopted in 2005 by the African Commission on Human and Peoples' Rights, includes a section to the independence of lawyers (section I) as well as specific provisions on the role of professional associations of lawyers in promoting the independence of the legal profession and the interests of their members.

14. The general role, composition and functions of bar associations are spelled out in the Standards for the Independence of the Legal Profession, adopted by the International Bar Association in 1990. Those Standards recognize that the independence of the legal profession constitutes an essential guarantee for the promotion and protection of human rights and is necessary to ensure effective and adequate access to legal services. They include specific provisions aimed at enabling professional associations of lawyers to discharge their competences in relation to access to the legal profession, legal education, legal aid and disciplinary proceedings.

# IV. Bar associations: general principles

## A. Definition

15. International and regional instruments generally use the expression "professional associations of lawyers" to refer to organizations established by lawyers at the national or local levels to protect the independence and interests of lawyers. Among those legal instruments, only Recommendation No. R(2000)21 expressly refers to "bar associations" in addition to lawyers' associations.

16. Existing legal standards do not provide a definition of what constitutes a professional association of lawyers. They simply focus on the necessary requirements that such institutions must possess, i.e. independence and a self-governing nature. Recommendation No. R(2000)21, for example, provides that lawyers' associations should be self-governing bodies, independent of the authorities and the public (principle V.2), and other standards contain similar language.

17. In most of the respondent States, lawyers' associations are referred to as "bar associations" or "bar councils". However, in some jurisdictions — that is, those that follow the British legal tradition — the term "bar association" only refers to associations that represent the interests of barristers (i.e. lawyers authorized to argue before higher courts), whereas solicitors (lawyers who advise clients, represent them in the lower courts and prepare cases for barristers to try in higher courts) have separate organizations, usually referred to as "law societies".

18. In the present report, the term "bar association" is used to refer to a general professional organization of lawyers established in a given jurisdiction to protect the independence of the legal profession and its members. The Special Rapporteur is aware that the use of such terminology goes beyond the meaning that the term has in some jurisdictions. In those cases, considerations related to bar associations apply — mutatis mutandis — to law societies as well.

## B. General mission

19. Existing legal standards place the promotion and protection of the independence and integrity of the legal profession and its members at the core of bar associations' mission.

20. The Basic Principles provide that the aim of lawyers' associations is to represent lawyers' interests, promote their continuing education and training and protect their professional integrity (principle 24). Recommendation No. R(2000)21 lists the strengthening of professional standards and safeguarding the independence and interests of lawyers (principle V.1). The Standards for the Independence of the Legal Profession highlight the protection of the independence of the legal protection as the general mission of bar associations, and then identify a wide range of functions that those organizations may exercise in order to achieve their general mission (para. 18).

21. The Special Rapporteur has emphasized on a number of occasions that associations of lawyers are created for two main purposes: to safeguard the professional interests of lawyers and to protect and strengthen the integrity and independence of the legal profession (see A/71/348, para. 82; and A/64/181, para. 19).

22. The general mission of bar associations in all countries that have responded to the questionnaire is the promotion and protection of the independence of the legal profession and its members.

## C. Independence

23. A bar association is generally deemed to be independent when it is mostly free from external influence and can withstand pressure from external sources on matters such as the regulation of the profession, the development and implementation of codes of professional conduct and the right of lawyers to join the association.[2] Government controls, whether direct or indirect, is eliminated or minimized to the greatest extent possible.

24. State involvement in the regulation of the legal profession varies greatly. Not all kinds of external intervention jeopardize the independence of the bar association. In some countries, such intervention is limited to the adoption of legislation on the legal profession,[3] often in consultation with the bar association. States may also retain the power to determine, in collaboration with the bar association, lawyers' fees,[4] the requirements and procedures for access to the legal profession[5] or the development and management of legal aid schemes.[6]

25. In other countries, State interference is more significant, for instance where the Government participates directly in the work of the executive and disciplinary bodies of the association,[7] or appoints some of the members of the disciplinary committee established by the bar association to handle disciplinary proceedings against lawyers.[8] In those cases, it is important that appropriate safeguards be adopted to ensure that

[2] International Bar Association, "The independence of the legal profession: Threats to the bastion of a free and democratic society" (2016), p. 8.

[3] In Germany and Lithuania, for example, national legislation on the legal profession is developed by the executive, whereas in Poland, the legislative branch is responsible for its development in consultation with the bar association.

[4] For example, Slovakia and Azerbaijan.

[5] For example, Lithuania.

[6] Czechia, Italy and Finland.

[7] For example, Cyprus.

[8] For example, Azerbaijan and Denmark.

the delegation of regulatory competences to external actors does not undermine the independence and integrity of the legal profession.

26. The best guarantee of independence is a self-governing body, understood as an organization independent from the State or other national institutions. All existing legal standards stress that bar associations should be self-governing. In practice, that means that the bar association should be able to set its own rules and regulations, make its own decisions free from external influence, represent its members' interests and be able to sustain itself.[9] That entails the profession's right to set up bodies to oversee compliance with such regulations, through the power to admit, discipline and disbar.

27. To ensure true independence, a bar association must also be able to sustain itself. The absence of financial sustainability can affect its operations and effectiveness. Bar associations often sustain themselves by membership fees and the organization of training and events.[10] In cases where it is necessary to obtain funding from outside the legal profession, bar associations should always ensure that external funding does not compromise its independence. They should be particularly cautious of receiving government funding, as such support may be aimed at keeping the bar association close and uncritical of the State machinery.[11]

28. The Special Rapporteur has highlighted on a number of occasions that bar associations should be provided with adequate human and financial resources to perform their functions independently and autonomously (see A/HRC/29/26/Add.3, para. 85; and A/HRC/23/43/Add.2, para. 89). In the latter report, the Special Rapporteur also expressed concerns at the lack of transparency in the allocation of funds to bar associations, which allegedly was subject to personal affinities and political allegiance. In a communication to Kazakhstan, the Special Rapporteur expressed concerns about a draft law on lawyers' activity and legal aid, now entered into force, which jeopardizes the financial independence of the bar by eliminating entrance fees for new lawyers.[12]

## D. Establishment

29. Bar associations represent first and foremost the legitimate exercise of freedom of assembly and association (see art. 22 of the International Covenant on Civil and Political Rights and principle 23 of the Basic Principles). In most jurisdictions, freedom of association is recognized in the national constitution and is as such applicable to lawyers, who are thus free to form or join any professional organization.

30. The Basic Principles do not provide any guidance with regard to the establishment of bar associations. Only the Standards for the Independence of the Legal Profession expressly provide that in each jurisdiction one or more independent, self-governing association(s) of lawyers recognized in law should be established, without any prejudice to the right of lawyers to form or join additional professional associations (para. 17).

31. The Special Rapporteur considers that in order to fulfil their role in society, bar associations should be recognized by law, and that it is the duty of State authorities to support the establishment and work of professional associations of lawyers without

[9] Nusrat Chagtai, *Benchmarking Bar Associations* (International Bar Association, 2016), p. 20.

[10] For example, the Bar Association of Serbia, the Law Society of British Columbia and the Law Society of South Africa.

[11] *Benchmarking Bar Associations*, p. 32.

[12] See communication OL KAZ 1/2018, available from https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=23579.

interfering in their activities (see A/64/181, para. 21; and A/71/348, para. 82). The law recognizing the bar association should include, at a minimum, provisions relating to its independence, its composition and the definition of its functions, and be elaborated with the meaningful participation of the legal profession (see A/HRC/32/34/Add.1, para. 121; and A/HRC/29/26/Add.4, para. 55).

32. The ways in which lawyers assemble and associate vary among different jurisdictions. Bar associations are established and organized taking into account the unique needs of their legal profession. The International Bar Association identifies five main regulatory models, where the legal profession is: (a) largely regulated by court, including mostly in South America and the Caribbean and in some states of the United States of America; (b) exclusively regulated by a bar association, including mostly in Europe, as well as Francophone and Lusophone Africa; (c) predominantly or exclusively regulated by the Government, including in the Gulf and some countries in Central and East Asia, such as Tajikistan, Kyrgyzstan, China and Viet Nam; (d) predominantly regulated by independent or delegated authorities, for example in England and Wales, a number of states of the United States, Canada and parts of Australia; or (e) predominantly regulated on a mixed or shared basis by representatives of different organizations, for example in some countries in West Africa, such as the Gambia and Ghana, as well as in the Caribbean, such as Belize and Jamaica.[13]

33. Bar associations with a regulatory component are generally established by law.[14] They are recognized as public entities[15] or private association with public functions,[16] and membership in the association is usually compulsory. Bar associations with exclusively representative functions are generally established as private associations, and membership is voluntary.[17]

34. In several country reports, the Special Rapporteur expressed concerns at the lack of a unified independent and self-governing bar association and recommended its establishment (see A/HRC/29/26/Add.1, paras. 78 and 123; A/HRC/23/43/Add.3, paras. 87 and 126; A/HRC/14/26/Add.2, paras. 69 and 88; E/CN.4/2006/52/Add.3, para. 85; E/CN.4/2003/65/Add.3, paras. 39, 93 and 108; and E/CN.4/1998/39/Add.1, para. 146). The mandate holder has also emphasized that the mere existence of a national bar association with no or little regulatory powers (see E/CN.4/2005/60/Add.2, paras. 48 and 81) or voluntary associations of a purely private nature serving the commercial or financial interest of lawyers (see E/CN.4/2003/65/Add.2, para. 114; and A/HRC/23/43/Add.1, paras. 94) are not sufficient to protect and promote the independence and integrity of lawyers.

35. When the profession is unable to exercise its right to associate freely, or where that right is restricted, in law or in practice, lawyers risk finding themselves isolated and unable to act collectively to influence important legislation and policies affecting the legal profession as a whole and the right of lawyers to defend their clients. Lawyers also become more vulnerable to abuse and risk losing their independence (see A/71/348, para. 81). In a report on Belarus, the Special Rapporteur expressed concerns that the functioning of the bar association was weakened by the continuing control by the executive branch over admissions and disciplinary procedures and other de jure and de facto obstacles to the effective implementation of the principle of equality of arms, and recommended that the Government adopt all appropriate measures to enable lawyers to form self-governing associations and refrain from excessive control of the profession (see E/CN.4/2001/65/Add.1, paras. 53–59 and 123).

[13] International Bar Association, "Directory of Regulators of the Legal Profession" (2016), p. 12.
[14] For example, Azerbaijan, Denmark, Mongolia, Serbia and Turkey.
[15] For example, Denmark, Lithuania and Portugal.
[16] For example, Czechia and Sweden.
[17] For example, the Law Society of South Africa.

36. The closure of professional associations of lawyers by the authorities is another trend that the Special Rapporteur has noted with deep concern, and it is a fact that professional associations operate in many countries under a continuing threat of immediate closure by the authorities (see A/64/181, para. 25). In Turkey, for example, 34 lawyers' associations have been shut down by decrees and had all their assets confiscated without compensation following the declaration of the state of emergency in June 2016. Chairs, board members and ordinary members of those associations have been prosecuted and sentenced to long-term imprisonment.[18]

## E. Composition

37. The Basic Principles provide that the executive body of the professional association shall be elected by its members and shall exercise its functions without external interference (principle 24). The Standards for the Independence of the Legal Profession and the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa contain similar language.

38. The Special Rapporteur emphasized that the central role in the establishment, work and appointment of executive bodies of the legal profession needs to remain with the lawyers, and that the membership of the executive body of lawyers associations needs to be pluralistic so that they do not become dependent upon one political party's interests (see A/64/181, paras. 26–27). Bar associations should not act as a part of a bureaucratic apparatus allowing for government control of the legal profession; they should operate as professional associations, working to protect the rights of its members. Situations where the State, in particular the executive branch, controls all or part of a bar association or its governing body, and where membership in such an organization is compulsory, are clearly incompatible with the principle of the independence of the legal profession (see A/71/348, para. 86).

39. Since its establishment, the mandate holder has documented various instances where State authorities exercise control or attempt to take control over the bar by adopting legal amendments or decrees, placing lawyers favourable to the Government in the governing bodies or using direct or indirect threats, pressure or intimidation.

40. In a communication on Tajikistan, for example, the Special Rapporteur expressed concerns on a draft law on the advocacy and the bar association, which placed the body in charge of regulating various aspects of the legal profession under the direct control of the Ministry of Justice.[19] In a report on the United Arab Emirates, the Special Rapporteur expressed concerns at the extensive involvement of the executive and the extremely limited participation of lawyers in the admission and registration of lawyers (see A/HRC/29/26/Add.2, para. 77). Similar concerns were raised in a report on Belarus, in which the mandate holder criticized the excessive control of the executive branch over the organization of the legal profession (see E/CN.4/2001/65/Add.1, paras. 66–76 and 123).

41. In the majority of countries that responded to the questionnaire, the executive body of the bar association is composed exclusively of lawyers appointed by their peers.

[18] Human Rights Institute of the International Bar Association and Law Society of England and Wales, "Challenges to the Independence of the Legal Profession under the State of Emergency in Turkey" (June 2018), pp. 5–6.

[19] See communication AL TJK 1/2015, available from https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=21961.

# V. Functions

42. The preamble to the Basic Principles emphasizes that bar associations have a vital role to play in upholding professional standards and ethics, protecting their members from persecution and improper restrictions and infringements, providing legal services to all in need of them and cooperating with governmental and other institutions in furthering the ends of justice and public interest.

43. The Standards for the Independence of the Legal Profession and Recommendation No. R(2000)21 contain a detailed list of functions that bar associations may carry out to promote and protect the independence and the integrity of the legal profession and its members. Those functions could be divided into two categories: regulatory and representative.

44. The regulatory functions refer to the elaboration of conditions to gain access to the legal profession; the development and implementation of minimum standards of professional behaviour; the provision of initial and continuing education to members of the legal profession; the handling of disciplinary proceedings against lawyers; and the enforcement of disciplinary decisions. Often, such regulation is based on rules and procedures set out by the bar association itself.

45. The representative functions refer, inter alia, to the bar association's role in promoting and upholding the cause of justice; defending the role of lawyers in society; maintaining the honour and dignity of the legal profession and its members; and promoting the welfare of its members and their families.

46. Not all bar associations exercise all those activities. In general terms, competences of bar associations range from direct regulation of the legal profession to no regulatory power and strictly representative functions. Between those two extremes, a wide variety of models exists. The International Bar Association indicates that the legal profession is exclusively regulated by a bar association in 52 per cent of countries (114 out of 219 countries or territories); by courts in 19 per cent of countries; by the Government in 6 per cent; and by a hybrid or mixed system in the remaining cases.[20]

## A. Protection of individual lawyers

47. The Basic Principles clearly state that the obligation to adopt all appropriate measures to ensure that lawyers are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference lies with the State authorities (principles 16 (a) and 17). They also provide that professional associations of lawyers shall cooperate with Governments to ensure, inter alia, that lawyers are able, without improper interference, to counsel and assist their clients in accordance with the law and recognized professional standards and ethics (principle 25).

48. Recommendation No. R(2000)21 provides that bar associations or other professional lawyers' associations should take any action necessary, including defending lawyers' interests with the appropriate body, in case of: (a) arrest or detention of a lawyer; (b) decisions to bring proceedings that call into question the integrity of a lawyer; (c) searches of lawyers themselves or their property; (d) seizure of documents or materials in a lawyers' possession; and (e) publication of press reports that require action on behalf of lawyers. The recommendation also provides

[20] "Directory of Regulators of the Legal Profession", p. 14.

that the role of bar associations in protecting their members and in defending their independence should be respected.

49. When lawyers are arrested or detained, the Standards for the Independence of the Legal Profession provide that bar associations should be informed immediately of the reason and legal basis for the arrest or detention and have access to the lawyer arrested or detained.

50. The Special Rapporteur considers that the protection of individual members of the legal profession lies at the core of bar associations' mandate, particularly in situations where they are not able to defend themselves adequately. In a previous report, the Special Rapporteur stated that bar associations could have no greater objective or interest than the protection of the independence of the profession and its individual members and that they are duty bound to rush in aid of their members when they are subject to harassment and intimidation (see E/CN.4/1998/39/Add.4, para. 36). In a number of country reports, the mandate holder noted with concern that bar associations were unable to provide appropriate support to their members when their security was threatened as a result of discharging their professional activities (see, for example, A/HRC/11/41/Add.3, para. 82).

51. Similar concerns have been addressed in communication procedures. In a communication to the Maldives, the Special Rapporteur expressed concerns about the arbitrary suspension from practice of 54 lawyers who had signed a petition calling for judicial reforms, and reiterated the recommendation made by his predecessor to establish a self-regulating independent bar association.[21] In a joint communication on Turkey, the mandate holder expressed concerns on the arrest, detention and criminal investigation of lawyers following the failed coup attempt of July 2016 and the closure of several lawyers' associations.[22] In a communication to the Russian Federation, the Special Rapporteur expressed concerns at the widespread acts of interference and violence against lawyers allegedly perpetrated by law enforcement forces and security officials and reminded the Government that, when a lawyer is arrested or detained, the respective legal profession should be informed immediately of the reason and be granted access to the lawyer in question.[23]

52. The responses to the questionnaire provide several examples of measures adopted to protect individual lawyers against threats and intimidation in relation to the legitimate exercise of their professional activities. Some bar associations have established special committees for the protection of the rights and legal interests of lawyers,[24] or security protocols to protect individual lawyers against threat or harassment.[25] In response to civil or criminal charges against individual lawyers, some bar associations offer legal representation and assistance to their members before judicial authorities.[26] In a number of countries, the search of lawyers' workplaces, homes or vehicles is allowed only in the presence of a member of the bar association or its authorized person.[27]

[21] See communication UA MDV 5/2017, available from https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=23342.

[22] See communication JOL TUR 5/2017, available from https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=23138.

[23] See communication AL RUS 9/2010.

[24] The Czech Bar Association and the Mongolian Bar Association.

[25] For example, the Law Society of Northern Ireland.

[26] For example, the Danish Bar Association and Law Society and the Law Association of Zambia.

[27] For example, Lithuania, Serbia and Slovenia.

53. A number of bar associations have established human rights commissions with the aim of supporting lawyers abroad through a rapid response mechanism and fact-finding missions.[28]

## B. Admission to the legal profession

54. The admission to the legal profession depends on the fulfilment of certain conditions, namely the achievement of minimum education and training requirements; the admission to the bar and the issuance of a licence to practise law; and membership of a bar association or law society. It should be regulated by law, transparent and objective in order to ensure the quality of the legal services and representation provided by lawyers. Safeguards must therefore be put in place to ensure that entry to the profession is not granted according to criteria other than knowledge, training and technical competence.

55. The Basic Principles require that Governments, professional association of lawyers and educational institutions take all appropriate measures to eliminate any form of discrimination with respect to entry into or continued practice within the legal profession (principle 10). They also call for the adoption of temporary special measures to facilitate access to the legal profession for members of disadvantaged communities or groups particularly vulnerable to discrimination (principle 11).

56. The Special Rapporteur considers that the legal profession is best placed to determine admission requirements and procedures and should thus be responsible for administering examinations and granting professional certificates (see A/64/181, para. 34). Access to legal education and entry to the profession must be open to everyone who meets the required criteria, and no discrimination regarding entry to the profession may take place on any grounds. The lack of clear conditions and criteria of admission to the legal profession and the absence of a compulsory uniform bar examination often result in significant disparities in competence among lawyers (see A/HRC/32/34/Add.1, para. 56; and A/HRC/23/43/Add.2, para. 92).

57. There are different systems for admission to the legal profession around the world. In some countries, candidates must pass a written and/or oral exam to gain admission to the profession. That exam may be organized by the bar association, directly or through an examination commission,[29] by a ministerial body[30] or by a qualification commission established by the Ministry of Justice and the bar association.[31] In the latter case, the legal profession may gain a degree of influence over the admission, depending on the extent to which lawyers form part of the commission and provided that the ministry issuing the licences does not retain the ultimate decision-making power regardless of the conclusions of the qualifications commission (see A/64/181, para. 33). In countries where there is no requirement to pass an examination in order to have access to the legal profession, the Special Rapporteur has recommended that a number of minimum criteria be fulfilled before a candidate be admitted to the bar and issued a licence to practise law, including the successful completion of a public examination (see A/HRC/20/19/Add.3, paras. 67–68; and A/HRC/17/30/Add.3, paras. 66 and 94 (cc)).

58. Admission to practise law or issue a practising certificate are two different but interdependent requirements for lawyers. Usually, a lawyer cannot obtain the right to

[28] For example, the Geneva Bar Association and the Law Society of England and Wales.
[29] For example, Finland, Mongolia, Montenegro, Portugal, Slovenia, Slovakia and South Africa.
[30] For example, Czechia and Denmark.
[31] For example, Lithuania.

practise until admitted, but admission alone does not entitle a lawyer to practise. Commonly, an annual practising licence or certificate will be required.

59. Different systems exist for the issuance of licences to practise law. In some countries, licences are issued by the bar association itself,[32] whereas in others they are issued by a governmental institution, such as the Ministry of Justice or another relevant ministry (see A/HRC/29/26/Add.1, paras. 79–80); and A/HRC/23/43/Add.3, para. 88), or by the Supreme Court of Justice (see A/HRC/35/31/Add.1, para. 63; and A/HRC/23/43/Add.1, paras. 64 and 91–92). In certain countries, lawyers are required to reapply to the Ministry of Justice for reregistration or relicensing after a certain period of time, which may vary between one to several years (see E/CN.4/2001/65/Add.1, para. 76).

60. Over the years, the mandate holder has often expressed concerns about situations where the entry into or continued practice within the legal profession is conditioned or controlled by the executive or the judicial branch, with the legal profession having no role or a very limited role in licensing procedures (see A/71/348, paras. 74–77; and A/64/181, paras. 31–39; see also A/HRC/29/26/Add.2, para. 77; A/HRC/26/32/Add.1, paras. 77–78; A/HRC/23/43/Add.1, paras. 91–92; and A/HRC/20/19/Add.3, para. 66). In those situations, State authorities may use their prerogatives to prevent certain individuals from entering the legal profession or to exclude lawyers who they deem to be "problematic" through the arbitrary withdrawal of lawyers' licences, registration or practising certificates. In the view of the Special Rapporteur, no licences should be withdrawn without the prior consent of the relevant lawyers' association, and any formal decision should be subject to judicial review (see A/64/181, para. 39).

61. In many countries, registration with the competent authority of the State, usually the bar association that has jurisdiction in the area of the lawyer's residence, constitutes a necessary precondition for representing clients before national judicial authorities.[33] The Special Rapporteur considers that mandatory registration with the bar association is fully consistent with international standards relating to access to legal services. However, mandatory registration presupposes the existence of strict and clear admission procedures and should not lead to a situation where qualified legal practitioners are denied equal and effective access to the bar. In a communication to Azerbaijan, the Special Rapporteur noted that the introduction of a mandatory registration with the national bar association as requirement for representing clients in criminal cases allegedly resulted in arbitrary exclusion from the bar of the most "problematic" candidates — for example, lawyers who had previously worked with human rights non-governmental organizations or represented political opponents.[34]

## C. Development of professional standards

62. Bar associations have an important role to play in setting up and enforcing professional standards and ethics. Indeed, the legal profession's right to self-govern, as stipulated in the Basic Principles, goes hand in hand with the obligation to also self-regulate effectively.[35] The Basic Principles provide that codes of professional conduct for lawyers should be established by the legal profession or by legislation, in accordance with national law and custom and recognized international standards and

[32] For example, the Law Society of Northern Ireland and the Portuguese Bar Association.

[33] For example, Azerbaijan, Cyprus, Denmark, Germany, Italy, Poland, Serbia and Slovakia.

[34] See communication OL AZE 1/2018, available from https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=23569.

[35] *Benchmarking Bar Associations*, p. 100.

norms (principle 26). Similar provisions can be found in Recommendation No. R(2000)21 and in the Standards for the Independence of the Legal Profession.

63. Codes of professional conduct have a dual function. First, their aim is to ensure that lawyers maintain at all time the honour and dignity of their profession and act, in the discharge of their professional functions, in accordance with predefined ethical standards and the duties and responsibilities intrinsic to their functions. Second, they are essential to ensuring the accountability of individual lawyers and the legal profession as a whole and to empowering the public to ensure lawyers maintain the high degree of professionalism expected. In a report on Mexico, the Special Rapporteur expressed the view that the lack of confidence in the legal profession depended, inter alia, on the lack of an independent oversight mechanism in charge of developing and enforcing strict ethical standards for the legal profession (see A/HRC/17/30/Add.3, paras. 65–66).

64. Codes of ethics should be developed by the legal profession itself. When established by law, the legal profession should be duly consulted at all stages of the legislative process (see A/64/181, para. 53). In a number of country reports, the Special Rapporteur expressed concerns over the lack of a uniform code of ethics applicable to all lawyers, countrywide (see, for example, A/HRC/32/34/Add.1, paras. 57–58; A/HRC/29/26/Add.2, para. 78; A/HRC/23/43/Add.2, paras. 90 and 129; E/CN.4/2005/60/Add.2, paras. 48 and 81; and E/CN.4/2003/65/Add.2, paras. 42 and 114).

65. In a number of countries that responded to the questionnaire, codes of ethics have been drafted by the bar association;[36] in some cases, they have been adopted by law.[37] In a few countries, there exist several codes of professional conduct (see E/CN.4/2001/65/Add.3, para. 42), while in others those codes have not yet been adopted (see A/HRC/23/43/Add.3, para. 87).

## D. Disciplinary functions

66. The establishment of an independent system for the consideration of disciplinary proceedings for alleged violations of the rules of professional ethics constitutes an important factor in the independence of the legal profession (see A/71/348, paras. 94–95; and A/64/181, paras. 55–58). The Basic Principles provide a number of provisions on the role of bar associations in disciplinary proceedings against lawyers, and similar provisions are included in regional standards. The main objective of those provisions is to ensure a proper balance between independence of the legal profession and accountability for the breach of ethics and professional standards.

67. According to the Basic Principles, disciplinary proceedings against lawyers should be brought before an impartial disciplinary committee established by the legal profession, before an independent statutory authority, or before a court (principle 28). The Standards for the Independence of the Legal Profession and Recommendation No. R(2000)21 provide that the appropriate lawyers' association should be responsible for or be entitled to participate in the conduct of disciplinary proceedings against lawyers. According to those principles, the body in charge of considering those complaints should be free from any influence or pressure from the legislative or the executive branches of power or any other party. In the view of the Special Rapporteur, disciplinary bodies should ideally be established by the legal profession itself (see A/64/181, para. 56).

[36] For example, Belgium, Northern Ireland, Montenegro, South Africa and Ukraine.

[37] For example, Denmark and Czechia.

68. Also according to the Basic Principles, complaints against lawyers in their professional capacity should be processed expeditiously and fairly under appropriate procedures, and lawyers should have the right to a fair hearing, including the right to be assisted by a lawyer of their choice (principle 27). Disciplinary proceedings should be determined in accordance with the code of professional conduct and other recognized standards and ethics of the legal profession and in the light of the principles (principle 29), and the decision of the body in charge of considering disciplinary proceedings should always be subject to an independent judicial review (principle 28).

69. To minimize the risk of arbitrary disbarments or targeted disciplinary action against lawyers, regulatory bodies must ensure that the provisions governing punitive measures against lawyers are clear and transparent. In order to ensure transparency and strengthen public confidence in the legal profession, information regarding the procedures by which complaints against lawyers are handled should be available to the public and easily accessible.

70. The responses to the questionnaire show that the responsibility for disciplinary proceedings against lawyers is usually vested in the bar association[38] or an equivalent independent body.[39] In other countries, disciplinary proceedings are handled by domestic courts.[40]

71. Disciplinary proceedings may represent a powerful weapon in the hands of Governments to interfere with the professional activities of lawyers, in particular those dealing with cases against the State or representing causes or clients that are unpopular with the existing regime.

72. Since its establishment, the mandate holder has documented several cases where disciplinary proceedings against lawyers were handled by the executive branch, either directly by the Ministry of Justice, for instance, in the Maldives, where a government entity deals with all disciplinary matters concerning lawyers (see A/HRC/23/43/Add.3, para. 43), or in Kyrgyzstan, by a qualification commission heavily controlled by the executive branch (see E/CN.4/2006/52/Add.3, paras. 56 and 59). In a recent case concerning Kazakhstan, the Special Rapporteur found that the disciplinary commissions established pursuant to the then-draft law on lawyers' activity and legal aid could not be regarded, in the light of their composition, as an independent body free from any influence or pressure from the legislative or the executive branches of power or any other party.[41]

73. Disbarment, which consists in taking away a lawyer's licence to practise law, possibly for life, constitutes the ultimate sanction for the most serious violations of the code of ethics and professional standards. Country reports show that, in many countries, lawyers are exposed to the threat of disbarment. Such threats aim at preventing the discharge of their professional duties or constitute an act of reprisal for activities carried out in the legitimate exercise of their responsibilities. The Special Rapporteur has stressed on a number of occasions that disbarment should only be imposed in the most serious cases of misconduct, as provided in the professional code of conduct, and only after a due process in front of an independent and impartial body granting all guarantees to the accused lawyer (see A/71/348, para. 96).

[38] For example, Estonia, Italy, Lithuania, Portugal and South Africa.

[39] For example, Azerbaijan, Denmark, Finland, Germany, Mongolia, Sweden and Ukraine.

[40] For example, Belgium and Germany.

[41] See communication OL KAZ 1/2018, available from https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=23579.

# VI. Partnership between the Government and bar associations in upholding the rule of law, promoting human rights and ensuring access to justice

74. For individuals to fully realize their human rights and fundamental freedoms, they must be protected by national legal systems. While the primary obligation to protect and promote human rights rests on the State, the Basic Principles recognize that the legal profession has a crucial role to play in upholding the rule of law, promoting human rights and ensuring access to justice. The preamble to the Basic Principles provides that professional associations of lawyers should cooperate with governmental and other institutions in furthering the ends of justice and public interest. Bar associations should also work together with State authorities in raising people's awareness about their rights and obligations, and the important role of lawyers in protecting their fundamental freedoms (principle 4).

## A. Access to lawyers and legal services

75. The provision of legal advice, assistance and representation for individuals who do not have sufficient economic means is an important area where bar associations and the State can cooperate to promote access to justice and human rights. According to the Basic Principles, professional associations of lawyers shall cooperate with State institutions in the organization and provision of services, facilities and other resources for legal services to poor and disadvantaged persons (principle 3). Furthermore, Principle 25 requires professional associations of lawyers to cooperate with governmental and other institutions to promote and provide effective access to legal services to all persons.

76. The role of bar associations in that area is further clarified in the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, adopted by the General Assembly in December 2012, which recognize that States have the primary obligation to adopt all appropriate measures to give effect to the right to legal aid in their domestic legal order, and identify different legal aid schemes to provide legal assistance to individuals who are otherwise unable to cover the costs of legal proceedings. The Principles and Guidelines call upon States to recognize and encourage the contribution of lawyers' associations in providing legal aid and recommend the establishment of public-private partnerships with bar associations to extend the reach of legal aid (principle 14).

77. The Special Rapporteur considered various options for the provision of legal aid through bar associations in a thematic report to the Human Rights Council (A/HRC/23/43). Access to legal aid has also been considered in a number of country reports (see A/HRC/29/26/Add.4, para. 60; A/HRC/20/19/Add.2, para. 82; and A/HRC/8/4/Add.2, paras. 44 and 76).

78. The responses to the questionnaire show that States have developed a wide array of schemes to facilitate access to legal aid. In some countries, legal aid schemes are set up and managed by the State itself,[42] at times through the court system.[43] In others, legal aid schemes are run by the lawyers themselves or the bar association, either autonomously[44] or in partnership with the State.[45]

[42] Italy, Finland and the United Kingdom of Great Britain and Northern Ireland.
[43] Germany and Switzerland.
[44] Denmark, Mongolia and Montenegro.
[45] Belgium, Czechia, Poland, Serbia, Slovakia and Sweden.

## B. Legal education and training

79. Bar associations are also encouraged to cooperate with State authorities in the areas of education and training of lawyers. The Basic Principles provide that Governments, professional associations of lawyers and educational institutions should ensure that lawyers receive appropriate education and training (principle 9), so as to be able to exercise the rights and duties set out in principles 12 to 15, consisting primarily of advising and protecting the rights of their clients and in upholding the cause of justice. Principle 24 includes the provision of continuing education and training among the main purposes of bar associations. Indeed, the development of codes of professional standards would fail to serve its purpose if lawyers were not educated on ethical standards.[46]

80. The Standards for the Independence of the Legal Profession define the functions of lawyers' associations as including the promotion of a high standard of legal education as a prerequisite for entry into the profession, the continuing education of lawyers and the provision of information to the general public on the role of a bar associations (para. 18 (h)). Similarly, Council of Europe Recommendation No. R(2000)21 requires that all measures necessary be taken to ensure high-quality initial training and continuing education of lawyers (principle II.2).

81. The mandate holder devoted an annual report to the issue of initial and continuing legal education and training of judges and lawyers (A/HRC/14/26). In that report, the Special Rapporteur highlighted the importance of legal education as a tool to strengthen the independence of the legal profession, and the role of bar associations in providing legal education and training to lawyers throughput their career (ibid., paras. 31–32, 37–39 and 55). The Special Rapporteur expressed the view that a basic training period prior to the admission to the legal profession and a basic scheme of continuing legal education would certainly enhance the general quality of lawyers' professional services and should be compulsory for all lawyers (ibid., paras. 41 and 57).

82. In a number of countries that responded to the questionnaire, bar associations cooperate with State and educational institutions in providing initial training and continuous education to lawyers.[47]

## C. Advocacy and monitoring

83. The Basic Principles acknowledge the important role that lawyers, alone and through the bar association, may play in the public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights (principle 23).

84. Bar associations must ensure that the legislation enacted by the State is in conformity with international human rights law and responds to the country's current needs and realities. They should advocate for a strong and independent judiciary and legal profession and denounce any abuse of power by State authorities that prevents or limits access to justice. The Special Rapporteur believes that, at a very minimum, bar associations should be consulted and allowed to participate in public debates concerning the adoption of legislation relating to access to justice or the organization of the legal profession (see, for example, A/HRC/32/34/Add.1, para. 121).

85. The role of bar associations is particularly fundamental in countries with weak or developing legal systems; in such circumstances, bar associations can play an

[46] *Benchmarking Bar Associations*, p. 111.

[47] Belgium, Estonia, Finland, Germany and South Africa.

essential role in transforming society.[48] They can advocate for law reform to promote human rights and the rule of law and play an important role in constitutional review or constitution-making processes. Through law reform activities, bar associations can further advocate for laws giving effect to international human rights standards.

86. The responses to the questionnaire provide several examples of the way in which bar associations participate in the development of legislation and policies on issues relating to their mandate. Some bar associations have established a human rights committee to monitor State compliance with its human rights obligations[49] and participate in public discussion concerning law reform, the administration of justice and the protection and promotion of human rights.[50]

## VII. Conclusions

**87. Bar associations play a vital role in the organization and safeguarding of the independence and integrity of the legal profession and its members. The underlying rationale for their creation is the need to provide a platform to allow the legal profession to carry its legitimate activities without any external interference.**

**88. Bar associations should meet, at a minimum, the following requirements: (a) independence; (b) a self-governing nature; (c) a general mandate to protect the independence of the legal profession and the interests of its members; and (d) recognition under law.**

**89. A bar association is generally deemed to be independent when it is mostly free from external influence. The best guarantee of such independence is a self-governing body, understood as an organization independent from the State or other national institutions that is able to set its own rules and regulation, make its own decisions free from external influence, represent its members' interests and be able to sustain itself.**

**90. In assessing independence, one should thus examine both the legal and regulatory provisions in place, and the actual impact they have on the ability of lawyers to carry out their duties in an independent and impartial manner. Some States have chosen a self-regulatory model, while others have a mixed model allowing for some State intervention. Not all forms of State intervention have, by themselves, an adverse impact on the ability of the legal profession to carry out their professional duties in accordance with the rule of law.**

**91. The present report shows that bar associations may carry out different functions to promote and protect the independence and the integrity of the legal profession and its members. They can have representative and regulatory functions or only representative functions. Regulatory functions pertain to: (a) the elaboration and implementation of requirements and procedures to gain access to the legal profession; (b) the promotion of initial and continuous legal education for lawyers; (c) the elaboration of code of professional conducts; and (d) the handling of disciplinary proceedings against lawyers. In the majority of countries that responded to the questionnaire, the legal profession is exclusively regulated by the bar associations.**

[48] *Benchmarking Bar Associations*, p. 128.

[49] The Law Society of British Columbia, for example, has established an advisory committee that monitors rule-of-law violations and attacks on the independence of judges and lawyers both in Canada and abroad.

[50] Azerbaijan, Estonia, Germany, Lithuania, Poland, Portugal and Sweden.

92. The legal profession has a crucial role to play in upholding the rule of law, promoting human rights and ensuring access to justice. Professional associations of lawyers should cooperate with State institutions in the organization and provision of legal aid services to poor and disadvantaged persons. The report shows that, in many countries, legal aid schemes are provided by bar associations, either autonomously or as a public-private partnership with the State. The report also highlights the important role of bar associations in providing legal education and training to lawyers throughout their career, and gives examples of how such associations contribute to public discussions on issues such as legal reform, the administration of justice and the promotion and protection of human rights and the rule of law.

93. Throughout the report, the Special Rapporteur has documented various forms of interference with the independence of bar associations. In many countries, legal or administrative obstacles prevent lawyers from establishing or joining independent professional organizations, and lawyers find themselves isolated and unable to act collectively to defend the independence of the legal profession and its members. In countries where bar associations have been established, the report identifies the various forms of external interference in their legitimate activities, ranging from different forms of control by the executive and judicial branches on the entry into or continued practice within the legal profession, to threats of disciplinary action and intimidation against the members of bar associations, that may even lead, in extreme circumstances, to their arbitrary arrest and detention.

## VIII. Recommendations

94. In the light of existing international and regional standards, and based on the contributions received, the Special Rapporteur would like to offer the following recommendations relating to the establishment, composition and functions of bar associations. The recommendations do not purport to identify an "ideal model" of bar association, but rather seek to identify common principles for ensuring the independence and the effectiveness of those associations in the discharge of their functions as guarantor of the independence of the legal profession.

### A. Establishment

95. The Special Rapporteur recommends that, in countries where there is no organized legal profession, an independent and self-governing bar association be established as a matter of priority to safeguard the independence and integrity of the legal profession and enable lawyers to exercise their legitimate activities without any external interference.

96. In order to guarantee their independence from the executive and judicial branches and ensure the effective self-governance of the legal profession, bar associations should be recognized by law. The law should include, at a minimum, provisions relating to the independence of such associations, their composition and the definition of their functions, and be elaborated with the meaningful participation of the legal profession.

97. Bar associations should be established and organized taking into account the unique needs of the legal profession. In order to ensure the integrity of the entire profession and the quality of legal services, it is preferable to establish a single professional association regulating the legal profession.

98. **Bar associations should be provided with adequate human and financial resources to perform their functions independently and autonomously. Membership fees are an important means to ensure the effectiveness and the independence of a bar association. In cases where it is necessary to obtain funds from external sources, bar associations should always ensure that external funding does not compromise their independence.**

99. **National authorities should support the establishment and work of bar associations without interfering with those processes.**

## B. Composition

100. **In order to guarantee the independence of the legal profession, the majority of members of the executive body of the bar association should be lawyers elected by their peers.**

101. **Members of the executive body should exercise their functions without external interference. Situations where the State, in particular the executive branch, controls all or part of a bar association or its governing body are incompatible with the principle of the independence of the legal profession.**

102. **The selection process for members of the executive body of a bar association must be transparent and participatory so as to avoid corporatism or politicization of the process. The membership of the executive body needs to be pluralistic in order to avoid its dependence upon any one political party's interests.**

## C. Duties and responsibilities

103. **The duties and responsibilities of the bar association should be clearly defined in the law recognizing it and in its internal by-laws. In order to safeguard the independence of the legal profession, the bar association should be responsible for regulating the access the legal profession, developing and implementing minimum standards of professional behaviour, providing initial and continuing education to the members of the legal profession and handling disciplinary proceedings against lawyers. The bar association should also have general functions with regard to the promotion of the role of lawyers in society and the maintenance of the honour and dignity of the legal profession and its members.**

104. **The involvement of State authorities in the regulation of the legal profession does not per se jeopardize the independence of the profession itself. When certain regulatory functions are assigned to the judiciary or the executive branch, it is important to adopt all appropriate measures to ensure that the delegation of those regulatory competences to external actors does not undermine the principle of independence and integrity of the legal profession.**

## D. Protection of lawyers

105. **The protection of the individual members of bar associations, particularly in situations where they may not be able to adequately defend themselves, should be at the core of the mandate of any bar associations.**

106. **It is the duty of all State authorities to respect the role of bar associations in protecting their members, so as to ensure that they are able to carry out their professional activities without any intimidation, hindrance, harassment or improper interference.**

107. When lawyers are arrested or detained, the bar association should be informed immediately of the reason and legal basis for the arrest or detention and have access to the lawyer arrested or detained.

## E. Admission to the bar

108. The Special Rapporteur considers that the legal profession is best placed to determine admission requirements and procedures and should thus be responsible for administering examinations and granting professional certificates.

109. The procedure for the admission to the legal profession should be based on objective criteria previously established by law or by the bar association itself. Entry to the profession should be based on merit, having regard to the qualifications, skills and capacities of the candidates, as well as to their independence and integrity. Competitive examinations conducted, at least partly, in a written and anonymous manner can serve as an important tool in the selection process.

110. The involvement of State authorities in the assessment of candidates risks undermining the independence of the legal profession. In cases where candidates are formally admitted to the legal practice by a ministerial body or a qualification commission, appropriate measures should be adopted to ensure that the admission to the bar is decided on the basis of the recommendation of the bar association, that the relevant authorities follow in practice.

111. The authority to issue a licence to practise law should rest with the bar association. In cases where licences are issued by another State institution, such as the Ministry of Justice or the Supreme Court, appropriate measures should be adopted to ensure that the issuance of the licence is decided on the basis of the recommendation of the bar association, that the relevant authorities follow in practice. The same principles apply to the renewal of licences.

112. No withdrawal of licences should take place without the prior consent of the relevant lawyers' association, and any formal decision should be subject to judicial review.

## F. Development of professional standards

113. Bar associations should have general responsibilities with regard to the development of professional standards and codes of conduct. When codes of professional conduct are adopted by law, the legal profession should be duly consulted at all stages of the legislative process.

114. The Special Rapporteur is of the view that the adoption of a unified code of ethics applicable to all lawyers country-wide constitutes a good practice.

## G. Disciplinary proceedings

115. The Special Rapporteur is seriously concerned about the widespread use of disbarment as a measure to intimidate lawyers and prevent them from discharging their professional duties. Disbarment should only be imposed in the most serious cases of misconduct, as provided in the professional code of conduct, and only after a due process in front of an independent and impartial body granting all guarantees to the accused lawyer.

116. In order to ensure a proper balance between independence of the legal profession and accountability for any breach of ethics and professional standards, the responsibility for disciplinary proceedings against lawyers should be vested in an impartial disciplinary committee established by the legal profession, an independent statutory authority or a court.

117. The disciplinary body should be free from any influence or pressure from the legislative or the executive branches of power or any other party. The involvement of the executive branch of power in the conduct of disciplinary proceedings against lawyers undermines the independence of the legal profession.

118. Disciplinary proceedings should be determined in accordance with the code of professional conduct and other recognized standards and ethics of the legal profession. In order to ensure transparency and strengthen public confidence in the legal profession, information on the procedures for handling complaints against lawyers should be available to the public and made easily accessible.

119. Lawyers submitted to disciplinary proceedings should have all procedural guarantees set out in article 14 of the International Covenant on Civil and Political Rights, including the right to defend themselves in person or with the assistance of a legal counsel of their choice.

120. Decisions of the disciplinary body should be reasoned and subject to an independent judicial review.

## H. Legal aid

121. Bar associations should cooperate with State institutions in providing access to legal advice, assistance and representation for individuals who are otherwise unable to cover the costs of legal proceedings.

122. In order to ensure a broader reach of the legal aid services provided or of pro bono legal aid, States should encourage bar associations to develop legal aid programmes or to support existing legal aid schemes. Where appropriate, States should establish partnerships with bar associations to ensure the provision of legal aid.

## I. Legal education and training

123. The Special Rapporteur underscores the importance of legal education as a tool to strengthen the independence of the legal profession.

124. Bar associations should cooperate with States and educational institutions in promoting a high standard of legal education as a prerequisite for entry into the profession and the continuing training to lawyers throughout their career.

## J. Advocacy and monitoring

125. Bar associations have an important advocacy role in upholding the rule of law and promoting the equal and effective enjoyment of human rights.

126. States should adopt all appropriate measures to enable the participation of bar associations in the public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights.

# Annex

## List of respondents

**States**

Angola

Azerbaijan

Bahrain

Cuba

Cyprus

Czechia

Denmark

Germany

Greece

Iraq

Italy

Lithuania

Madagascar

Malta

Mexico

Mongolia

Montenegro

Namibia

Poland

Portugal

Qatar

Serbia

Slovakia

Sudan

Sweden

Switzerland

Turkey

Ukraine

**Bar associations**

Council of Bars and Law Societies in Europe

Cyprus Bar Association

Estonian Bar Association

Finnish Bar Association

German Federal Bar

Kuwait Bar Association

Law Society of England and Wales

Mexican Bar Association

Mongolian Bar Association

Slovenian Bar Association

Swedish Bar Association

**Civil society**

International Bar Association Human Rights Institute

United Nations A/73/366

General Assembly

Distr.: General
5 September 2018

Original: English

**Seventy-third session**
Items 127, 136 and 137 of the provisional agenda*

**United Nations reform: measures and proposals**

**Review of the efficiency of the administrative and financial functioning of the United Nations**

**Programme budget for the biennium 2018–2019**

# Shifting the management paradigm in the United Nations: comparative assessment of human resources structures

## Report of the Secretary-General

*Summary*

The General Assembly, in its resolution 72/266 B, requested the Secretary-General to submit a comparative assessment of placing human resources functions in a single consolidated department or two distinct departments, with a view to ensuring a unified approach, optimizing the distribution of functions and avoiding duplication. These objectives can be achieved only through the segregation of strategic and operational functions into separate structures as proposed by the Secretary-General, an approach that is in line with broader trends in both public and private sector organizations. Complementarity in the functions of the two structures will be underpinned by robust coordination mechanisms.

The present report responds to that request by outlining the current structures and challenges related to human resources management in the Secretariat before assessing the ability of a single structure or a dual structure to effectively address these challenges. Although many of the current human resources management challenges faced by the Secretariat have structural causes, the report also draws the attention of the Secretariat to other considerations that must also must be taken into account, including in the areas of policy and delegation of authority.

* A/73/150.

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# I. Introduction

1. The General Assembly, in its resolution 72/266 B, approved the reorganization of the current Department of Management and Department of Field Support into the proposed new Department of Management Strategy, Policy and Compliance and Department of Operational Support and the proposed new subsections 29A to 29D of section 29 of the programme budget for the biennium 2018–2019. It also requested the Secretary-General to submit a comparative assessment of placing human resources functions in a single consolidated department or two distinct departments, with a view to ensuring a unified approach, optimizing the distribution of functions and avoiding duplication. The present report responds to that request.

2. The current structure for human resources management at Headquarters, which includes both the Office of Human Resources Management in the Department of Management and the Field Personnel Division in the Department of Field Support, emerged over time as a result of the vast range of disparate activities for which the Secretariat is responsible. Before September 1993, responsibility for all administrative functions in the Secretariat, including human resources, was vested in the former Department of Administration and Management, which was reorganized into the present Department of Management in 1997. However, the increase in the complexity of the activities of the Secretariat in the early 1990s, driven largely by the significant expansion of peacekeeping missions, led to the recognition that a single structure could no longer effectively perform the full range of administrative functions for the entire Secretariat. As a result, the Field Operations Division was transferred from the Office of the Under-Secretary-General for Administration and Management to the newly established Department of Peacekeeping Operations to provide dedicated administrative and logistical support to peacekeeping missions. This division was later expanded to become the Office of Mission Support, which was subsequently transformed into the Department of Field Support when the Department of Peacekeeping Operations was restructured in 2007.

3. The existing structures have allowed the Secretariat to respond to the increasing demands placed upon the Organization, in particular in the field. However, the differing scope of the mandates and delegated authorities results in inconsistent levels and types of service to different types of entities across the Secretariat. Moreover, the division of responsibilities between the two departments is often unclear. To ensure that the Organization operates at a level of effectiveness and accountability that meets the expectations of Member States and ensures effective mandate implementation in all areas of work, and that enables the achievement of the Secretary-General's vision of reform, a paradigm shift is also required in the area of human resources management.

4. A number of efforts to reform the management of human resources have been undertaken over the past decades, and improvements will clearly continue to take place. Nevertheless, the Organization is still not as operational and effective as it needs to be. The reforms of the Secretary-General are therefore aimed at ensuring that the Organization has a workforce with the skill sets and dynamism to meet new and emerging challenges. A globally dispersed Secretariat with responsibility for a wide range of activities, ranging from the registration of treaties to conference management to the conduct of complex field and emergency operations, requires a more dynamic and responsive approach to accountable resource management if the Organization is to deliver results to Member States and vulnerable populations in a manner that recognizes the reality that has developed over the past seven decades.

5. The new management paradigm envisaged by the Secretary-General, which is based on the principles of simplification, decentralization and delegation, will

empower managers and hold them accountable for managing resources, including human resources, to deliver on their mandates. Implementing the new paradigm and addressing the underlying issues that have previously hindered the effective and accountable administration of the Secretariat require a reorganization of the management structures at Headquarters. The elimination of duplicative structures and the creation of two new departments, focused on policy consistency and accountability and operational support effectiveness, respectively, are necessary to ensure that enhanced delegation of authority to senior managers translates into improved programme delivery, responsible stewardship of Member State resources, and a more responsive and proactive United Nations. The new structure proposed by the Secretary-General and approved by the General Assembly separates strategy, policy and compliance from functions that support operational activities to eliminate duplication, streamline processes, create synergies and provide more timely and effective management support to programme and mandate delivery across the Secretariat.

## II. Existing structures at Headquarters

6. Human resources responsibilities within the Secretariat at Headquarters are currently divided between the Office of Human Resources Management in the Department of Management and the Field Personnel Division in the Department of Field Support. In addition, most organizational entities within the Secretariat, such as departments, offices, regional economic commissions and peace operations, have an administrative unit or executive office that supports heads of organizational entities in human resources management through tasks such as filling vacancies and managing staff performance based on their responsibilities under the Staff Regulations and Rules of the United Nations and related administrative instructions. These units also handle transactional functions, such as assisting staff members and, where applicable, their dependants in obtaining entitlements. In some places, the administrative units of one entity also provide services to others in the same location, as is the case with the Executive Office of the Department of Management, the joint Executive Office of the Department of Peacekeeping Operations and the Department of Field Support at Headquarters and the divisions of administration at the offices away from Headquarters.

### Office of Human Resources Management

7. The Office of Human Resources Management, headed by the Assistant Secretary-General for Human Resources Management, is responsible for formulating policy and providing administrative support to entities across the Secretariat and strategic guidance and direction in human resources management. With the exception of matters reserved exclusively for the decision of the Secretary-General, the authority for human resources management through the administration of the Staff Regulations and Rules is delegated by the Secretary-General to the Under-Secretary-General for Management, who further delegates authorities to the Assistant Secretary-General for Human Resources Management. The Office of Human Resources Management therefore serves as the central authority for matters pertaining to the management of human resources in the Secretariat. In addition to the Office of the Assistant Secretary-General, the Office of Human Resources Management consists of the Strategic Planning and Staffing Division, the Learning, Development and Human Resources Services Division, the Medical Services Division and the Human Resources Policy Service.

8. The Strategic Planning and Staffing Division is tasked with supporting the management of the Secretariat's human resources through strategic workforce

planning and by monitoring the use of delegated human resources management authority, managing the implementation of the staff selection system, developing a talent management system, conducting competitive examinations and performing outreach. The Learning, Development and Human Resources Services Division is responsible for administering and monitoring staff benefits and entitlements, providing advice to management and staff on the implementation of human resources management policies, developing and implementing learning and development programmes and overseeing the performance management system. The Medical Services Division is responsible for promoting staff health, providing advice to United Nations medical facilities and advising on issues related to medical administration, including the evaluation and certification of sick leave. The Human Resources Policy Service is responsible for developing human resources policies, making amendments and revisions to the Staff Regulations and Rules, conducting salary surveys and developing classification policies and standards, managing disciplinary cases related to United Nations staff and managing appeals against administrative decisions, including by representing the Secretary-General before the United Nations Dispute Tribunal.

**Field Personnel Division**

9. The Field Personnel Division in the Department of Field Support focuses on activities in support of peacekeeping operations, special political missions and the Regional Service Centre in Entebbe, Uganda. It provides advice to peace operations on the use of their delegated authority, including through the development of guidance, on issues related to the system of administration of justice and on the processing of exceptions. It also supports enterprise initiatives, such as the implementation of Umoja and the review of continuing appointments, enables selection and recruitment in the field as well as the processing of senior-level appointments, supports workforce planning and organizational design, reports on and monitors delegated authorities, represents field requirements in deliberations on human resources policies and processes, and supports surge, start-up, transition and liquidation processes in peace operations.

10. With the establishment of the Department of Field Support, many of the services previously performed by the Office of Human Resources Management for peacekeeping and special political missions are delivered by the Field Personnel Division. In addition, as Secretariat-wide policies do not currently exist for many critical areas that primarily affect field duty stations, such as downsizing and the use of national staff and the Field Service category, the Field Personnel Division has also developed and issued interim guidance on these areas.

## III. Current challenges

11. Despite the reforms undertaken in the past decade, the Secretariat still requires a transformation in the human resources management framework to allow it to more effectively support the delivery of its programmes and mandates. The key issues faced by the Organization in the area of human resources management were highlighted in an evaluation conducted in 2018 by the Office of Internal Oversight Services of the Office of Human Resources Management. The Secretariat has already begun to address many of these issues, as reflected in the report of the Secretary-General on the overview of human resources management reform for the period 2017–2018 (A/73/372/Add.1). However, many challenges stem from or are exacerbated by the existing structure of human resources management at Headquarters. The current breadth of functions performed by the Office of Human Resources Management, which spans both operational and strategic functions, prevents the Office from

devoting sufficient attention to either set of requirements. Furthermore, the overlapping responsibilities of the Office of Human Resources Management and the Field Personnel Division create confusion and result in inconsistent practices and interpretations across the Secretariat, as reflected in the observations of oversight bodies. These structural issues in turn exacerbate other persistent problems in human resources, including the need to strengthen policy analysis and development, increase attention to strategic issues such as workforce planning and talent management, improve approaches to the implementation of strategies and policies and strengthen the monitoring of delegated human resources management authority.

**Policy analysis and development**

12. The human resources policies of the Secretariat are a framework intended to ensure equal opportunities for and the fair treatment of all staff. The current framework is complex, leading to unnecessary delays, the inconsistent application of policy and reduced transparency and accountability in human resources management.

13. In its evaluation, OIOS found that the human resources policy framework did not facilitate the achievement of the human resources goals of the Organization. Its specific findings were as follows: the human resources policy framework was voluminous, fragmented, outdated and contained gaps and contradictions; the policy framework required significant interpretation and judgment, resulting in administrative inefficiency and inconsistent application; clients and staff perceived that the framework and its implementation focused disproportionately on compliance rather than results and did not adequately respond to operational needs; there was no mechanism for ensuring that policy changes were responsive and coherent; human resources policies and procedures were increasingly issued with little preparation time for implementation and with limited communication; and resources devoted to human resources policy development were limited. In an audit of the process for promulgating administrative issuances in the Secretariat,[1] OIOS also found that there were no periodic reviews to ensure that existing administrative issuances remain relevant.

**Attention to strategic human resources management issues**

14. Strategic management issues such as holistic and comprehensive talent management and workforce planning are important areas of focus for the Secretariat. Although some progress has been made, greater efforts, and more enabling structures and mechanisms, are needed to ensure the achievement of the objective of an integrated system in which the Organization can attract, retain and develop the talent it requires while also meeting organizational objectives for gender parity and geographical representation. The Secretariat has repeatedly reaffirmed the importance of these issues in its reports to the General Assembly on human resources management.

15. In its evaluation, OIOS found that the Office of Human Resources Management had made progress on individual components of talent management, but shortcomings remained and greater focus was needed in the area of integration. Specifically, it found that the Office had developed the basic tools for and supported the implementation of workforce planning pilots, but workforce planning had not gained traction in the Secretariat, that recruitment and selection policies, processes and practices had not fully supported the hiring of the best talent for the Organization, that, despite initiatives to improve performance management, the system continued to be viewed as mechanical and devoid of meaning, that investments in the training and development of Secretariat staff had been low, although the Department of

[1] Office of Internal Oversight Services (OIOS), Internal Audit Division, report 2017/064.

Management had introduced cost-effective delivery options, that staff felt unsupported in outlining a career path in the Secretariat and that the individual components of the talent management framework were not integrated. A comprehensive multi-step approach has been designed to achieve the 120-day target for recruitment set by the General Assembly. However, achieving significant impact, for example, by hiring the best talent, will require strengthened operational support and compliance capacities. In addition, more attention needs to be given to the design and roll-out of system-wide strategies, policies and methodologies for career development and training that are aligned with programme mandates.

**Ensuring consistency in implementation**

16. Under the existing arrangements, the implementation of human resources strategies and policies varies considerably across the Secretariat for a variety of reasons. In its evaluation, OIOS found that the complicated policy framework required considerable interpretation, which was not necessarily consistent across entities of the Secretariat. In fact, the Board of Auditors, in its report on the accounts of the United Nations peacekeeping operations for the financial period ended 30 June 2017 (A/72/5 (Vol. II), chap. II), noted that a total of 281 different documents delegated authority or clarified the rules in the area of human resources, therefore requiring considerable interpretation. The Board also noted that the system of delegation of authority was not currently coherent and appeared to be built on an ad hoc basis. This contributes to the divergences in practice observed across various offices and departments by the oversight bodies, including in a recent audit by OIOS of education grant disbursements at the Secretariat.[2]

17. Gaps in policy also exist. For areas in which policies have not been developed or formally issued, parts of the Secretariat have issued their own guidance or standard operating procedures, which may differ from practices in other parts of the Secretariat. For example, peacekeeping and special political missions currently operate on interim guidance issued by the Department of Field Support on downsizing and the use of national staff and the Field Service category. Moreover, the fact that the Department of Field Support currently serves as the primary conduit for advice, support, monitoring and capacity-building to peacekeeping and special political missions, but not to other parts of the Secretariat, also introduces a structural component to the divergent approaches and inconsistent application of policies at the Secretariat.

**Monitoring of delegated authority**

18. In its evaluation, OIOS found that the delegation of authority framework on human resources lacked clarity and had contributed to inefficiencies, and that there had been little monitoring. In its thematic audit of education grant disbursements,[2] OIOS noted that the delegation of authority was formalized through a variety of documents, but that no central repository of those documents was maintained, impeding the monitoring of the use of delegated authority by either the Department of Management or the Department of Field Support.

**Structural challenges**

19. The existing structures at Headquarters contribute to the problems outlined above in two primary manners. First, the current responsibilities of the Office of Human Resources Management are vast, encompassing strategy, policy and compliance, as well as operational support, including transactional services to a large part of the Organization. The breadth of these functions combined with limited

[2] OIOS, Internal Audit Division, report 2018/043.

resources has constrained efforts to move forward on certain strategic reforms and innovations, including the full implementation of strategic workforce planning and career development. The Office has also faced challenges in policy analysis and the development of human resources policies that meet the requirements of all the different types of entities within the Secretariat. These issues stem largely from the fact that operational and transactional functions take up the bulk of the time, attention and resources of the Office. Moreover, the resources devoted to strategy are often overwhelmed by a perpetual reform cycle. At the same time, the dual focus of the Office also causes the quality of services provided to clients to suffer. In its evaluation, OIOS identified a need to improve client orientation in the provision of human resources services.

20. Second, as the bulk of interactions with peacekeeping and special political missions are handled by the Field Personnel Division, the Office of Human Resources Management is less familiar with the specific requirements of field operations. Furthermore, no formal process currently exists by which the requirements of different types of entities can be systematically reflected in policy development. These are important explanations for why the existing body of administrative policies managed by the Office does not meet the requirements of all types of entities within the Secretariat, in particular field missions, as highlighted by the High-level Independent Panel on Peace Operations in its report of 2015 (see A/70/95-S/2015/446). The Panel raised concerns about the existing Headquarters-focused policies, administrative procedures and practices. It noted that field perspectives and needs were not adequately reflected in the development of human resources and other policies and that the field must be fully and thoroughly consulted during the development of administrative policies to ensure that the differentiated requirements of field operations are taken fully into consideration when major policy initiatives are proposed.

## IV. Structural approaches to addressing existing challenges

### Single structure

21. A monolithic human resources structure is one approach to addressing the human resources management issues facing the Secretariat. However, it is neither the preferred approach of the Secretary-General nor a vehicle for achieving the results intended through the establishment of the two new departments. In theory, having a single structure responsible for strategy, policy and operational support across the entirety of the Secretariat could improve consistency in the application of policy across different parts of the Secretariat. However, a monolithic structure would be responsible for such a broad range of disparate functions, and its sheer size and complexity would make it too unwieldy to be effectively and efficiently managed. Such a structure would not address the risks of drawing resources and attention from longer-term strategic and policy-related goals towards addressing more immediate operational requirements. Moreover, the allocation of policy and compliance functions to the same department as execution functions would undermine the functional separation that serves as one of the key features of the restructured departments.

22. In summary, with regard to the problems outlined above, while a monolithic human resources structure might appear to promote a unified approach to human resources management across the Secretariat and avoid duplication, the breadth of its responsibilities would make too unwieldy to function effectively. Moreover, such a structure would not represent the optimal distribution of functions as the lack of separation between strategic and operational functions would not solve the current

problems related to policy analysis and development. It would also not ensure that sufficient attention is paid to strategic and policy issues.

**Dual structure**

23. A dual structure for human resources management in which both structures have distinct roles and serve all organizational entities within the Secretariat would facilitate a clear division of responsibility that would not only enable the Organization to address the current gaps and shortcomings in policy development but also allow for a clear separation of the operational and compliance functions as these would be located in two separate departments. It is very difficult for any structure in an organization to be simultaneously responsible for the provision of client-oriented services and internal oversight and quality assurance over those same services. As previously indicated by the Secretary-General, the United Nations has lost its ability to constructively critique itself and, for this, it is imperative that there be a separation of these functions to protect against the likelihood of conflicts of interest and allow for better risk management and more objective evaluation. It would also facilitate the specialization required to ensure that resources and management attention are dedicated to the strategy and policy aspects of human resources, on the one hand, and to operational and client-oriented functions, on the other.

24. A dual human resources structure in which responsibilities are separated between strategic and operational activities would address concerns related to inconsistent approaches to implementation and problems related to policy analysis and development. It would also increase attention to strategic issues by ring-fencing the resources dedicated to those tasks, including policy development, and separating them from operational and transactional support services. Such a structure would therefore ensure a unified approach to human resources management, optimize the distribution of functions and avoid duplication. However, a dual structure introduces the risk of divergence between the policy and operational functions. This would need to be mitigated by establishing coordination mechanisms between the two structures to ensure effective feedback between the policy and operational functions.

**Proposal of the Secretary-General**

25. As indicated in the report of the Secretary-General entitled "Shifting the management paradigm in the United Nations: implementing a new management architecture for improved effectiveness and strengthened accountability" (A/72/492/Add.2), the proposal for two empowered departments serving all Secretariat entities is based on the sound management principles of unity of command and purpose, clarity of roles and responsibilities and empowered delegations of authority that are rational, holistic and decentralized as far as possible within an established risk framework. This structure ensures that there is dedicated capacity and attention to allow the Secretariat to focus on strategic human resources requirements in the Department of Management Strategy, Policy and Compliance, operational and transactional activities in the Department of Operational Support and programme delivery in the other organizational entities across the Secretariat.

26. While the present report focuses on the structures of the proposed Department of Management Strategy, Policy and Compliance and the proposed Department of Operational Support, it cannot be stressed enough that the focus of the management reforms is on the empowerment of the nearly 100 discrete departments, offices, regional commissions, tribunals and field operations that make up the Secretariat and that the new management structures exist to support these entities in delivering their mandates effectively and accountably.

27. Under the new paradigm, the Department of Management Strategy, Policy and Compliance will work to align the Organization's human resources with its mission and mandate through the development and refinement of a global human resources strategy and innovative policies based on the needs of both the Organization and its personnel. It will be the primary external client-facing department, serving as the main interface of the Secretariat with Member States and the oversight bodies. The Office of Human Resources in the Department will focus on establishing human resources strategies, developing human resources policies and establishing accountability and compliance frameworks for human resources (and other areas) with effective monitoring systems. This focus is critical to building and maintaining a sound foundation for the envisioned decentralization and the empowerment of managers at the point of delivery, with the requisite accountability. Managers will need to have this robust framework to exercise the responsibilities delegated to them. A new Business Transformation and Accountability Division in the Department of Management Strategy, Policy and Compliance would will monitor in real time the decisions taken under delegated authority in entities across the Secretariat.

28. As much decision-making authority as practicable will be delegated directly from the Secretary-General to heads of entities. However, not all operational human resources functions can be effectively executed in a decentralized manner. The Department of Operational Support will be the primary internal client-facing department, and the Human Resources Services Division in the Department will perform operational tasks that cannot be effectively delegated, including global roster management, the administration of examinations, the placement of staff across entities during downsizing exercises or as part of mobility and support to surge and crisis situations, in addition to providing advice to clients on the application of the policy framework and performing human resources tasks on behalf of entities that lack the requisite capacity to accountably execute their delegated authority. By consolidating operational functions in one department, entities across the Secretariat will have a designated department focused on direct client services with the ability to shape human resources processes from end to end. This will allow for fast and effective service delivery, ensuring that managers in client entities are well-equipped to apply the strategies and frameworks developed by the Organization. Having an entity that provides dedicated operational advice to client entities in turn allows for increased efficiency, consistency and speed in decision-making across the Secretariat. These benefits can be further enhanced by consolidating transactional functions in shared service centres reporting to the Department of Operational Support, as proposed in the global service delivery model.

29. While many of the benefits of the new departments will be felt in entities located in the most volatile environments, all entities, including those at Headquarters, will benefit from the enhanced delegation of authority that will be progressively rolled out over the course of 2019, a simplified and more responsive policy framework, a single point of contact for advice and the ability to devote a greater proportion of their resources and attention to programme delivery rather than administrative tasks. Entities that lack sufficient capacity to accountably exercise the full range of delegated authorities will be supported through units such as the Headquarters Client Support Section in the Department of Operational Support and the divisions of administration in the offices away from Headquarters.

30. To ensure effective coordination between the two departments and a constant feedback loop between strategy and policy, on the one hand, and execution, on the other, a senior management committee co-chaired by the Under-Secretaries-General of the two departments will bring together, on a regular basis, the senior management of both departments to identify and address cross-departmental priorities, strategic issues and issues related to the efficient and effective delivery of services to clients.

This coordination mechanism between the two departments is separate from, but complementary to, the Management Client Board, which will serve as a feedback and consultation mechanism between management architecture at Headquarters and the different types of entities across the Secretariat. As indicated in the previous reports of the Secretary-General on shifting the management paradigm in the United Nations, the Management Client Board will be co-chaired by the heads of the two new departments and include rotating representatives of each of the different types of entities across the Secretariat. The Board will serve as a mechanism by which the different types of entities can ensure that their particular requirements and concerns are understood by the two new departments and are therefore reflected in the development of regulations, rules and policies and the delivery of operational support. Where an operational requirement is identified, the Board will also feed into policymaking processes, including the development of field-specific policies, if required.

31. Another area that would benefit from the clear delineation of responsibilities between the two departments is the provision of advice on the application of human resources policies. Most requests would be addressed at the client level through the human resources capacity in the executive office or administrative unit of the organizational entity in question, whether a department, office, regional commission or mission. Should client-level human resources sections or officers be unable to resolve a human resources issue and require advice on the practical implementation of policy or an operational issue not captured in the policy frameworks, the business partner in the client entity would refer the issue to the Human Resources Services Division in the Department of Operational Support. This division, by virtue of its dedicated human resources support capacities and its global visibility over human resources management implementation across all Secretariat entities, would be in a position to provide advice on the vast majority of issues. In complex cases or exceptional issues not covered in the policy framework, the Department of Operational Support would escalate the issue to the Department of Management Strategy, Policy and Compliance for a decision. The definitive interpretation provided would then guide the advice given by the Department of Operational Support on similar issues in future. This tiered model for the delivery of human resources advice has many benefits over the current ad hoc framework as it establishes, in the Department of Operational Support, a clear entry point for questions related to human resources management. It also ensures that the advice given is in line with the policy framework without overwhelming the policy functions with day-to-day client-facing support, while also drawing the attention of the policy functions to gaps and emerging issues not covered by existing policy that may warrant additional attention.

32. Recruitment, for example, is an issue routinely identified as a pain point under the current arrangements. In the future, the division of responsibilities among the various stakeholders will be clear and will allow all parts of the Secretariat to be better able to secure the right expertise in the right place and at the right time. The Office of Human Resources of the Department of Management Strategy, Policy and Compliance will be responsible for maintaining the overall human resources policy framework, reflecting the requirements of all types of entities as communicated through the Management Client Board. The Human Resources Services Division in the Department of Operational Support will be responsible for developing streamlined beginning-to-end recruitment processes and maintaining and refreshing rosters, including through the administration of examinations, to ensure that qualified candidates are available to meet any requirements that may arise across the Secretariat, all within the policy framework managed by the Department of Management Strategy, Policy and Compliance. Empowered heads of entities will be presented with shortlists of pre-cleared candidates to choose from to fill vacancies and will be accountable for meeting gender and geographical representation targets.

Any questions they have on the interpretation and implementation of policies would go to their business partner, who can refer those questions to the advisory capacities in the Department of Operational Support.

33. Having human resources functions divided between the two departments also facilitates an appropriate system of checks and balances in line with the Secretary-General's vision of decentralization, clear delineation of responsibilities and accountable exercise of delegated authorities. Checks and balances are ensured by having one department monitor the exercise of authorities and determine when that authority is not being exercised as required, while a separate department advises on the day-to-day exercise of the authorities and assumes this responsibility in the event that it is either not granted to or removed from an entity, thereby ensuring objectivity in the making of such determinations. This approach is aligned with global best practices in the public sector with respect to the separation of implementation and compliance functions and will allow for continual service improvements within a robust internal control framework.

**Comparison with other organizations**

34. Direct comparisons between United Nations structures and other organizations are difficult given the multilateral nature of the Organization and its sheer size and broad remit. Nevertheless, analogues to the proposed human resources structure can be found in many national governments. For example, policies and conditions of service for the civil service are often determined for the entire government by a dedicated agency or commission, and each individual ministry often has its own structures for managing its personnel and, in the case of ministries of foreign affairs, supporting the personnel requirements for diplomatic missions and other presences abroad.

35. More broadly, in both the private and the public sectors, there is a clear trend towards the formal separation of strategic and operational human resources tasks into separate, distinct organizational units. This enables organizations to separate operational functions, including the standardized or routine requirements critical to the normal operation of the organization, from the traditional human resources structure to allow a greater focus on strategic human resources responsibilities. The consolidation of operational functions also allows organizations to standardize processes, improve controls and accountability and decrease duplication to improve efficiency. The highest-performing operational structures greatly streamline processes by applying continuous process improvement, automation technology and advanced analytics. They also adopt a service delivery mindset to improve customer experience and ensure timely service delivery.

36. Analysis of human resources structures across both private and public sector organizations shows that key benefits can be realized through the separation of strategic and operational functions. In general, consolidating operational functions can enable organizations to achieve significant efficiencies and improvements in process effectiveness at scale. It also allows both sides of human resources to focus on their missions. Without a clear separation, it is easy to focus on addressing the more immediate and familiar operational requirements at the expense of the equally critical, longer-term strategic requirements. A formal and physical separation can serve to ensure a true division of roles. While human resources personnel performing strategic and operational roles are placed in the same structure under the traditional human resources model, in practice the links between the two aspects of human resources are largely only necessary at senior levels and can be detrimental at more junior levels. The experience of other organizations shows that, at the senior levels, coordination between strategic and operational human resources structures to ensure alignment on cross-cutting topics is necessary primarily in two areas, namely,

translating newly created policies into processes and supporting the management of exceptions when issues arise. Most other topics can and should be handled entirely within one of the two structures.

## V. Other considerations

37. The objective of the management reform is not to establish new structures, but rather to facilitate the overall paradigm shift to a decentralized Secretariat, where responsibility for programme delivery is aligned with authority for resource management under a streamlined policy framework, all to enhance the ability of the Organization to deliver on its mandates in an effective and accountable manner. The new structures serve as enablers for this paradigm shift and are critical for addressing long-standing challenges in the existing management framework. However, addressing the management architecture is only part of the equation. Some key problems that must be addressed, such as the lengthy recruitment process, are also products of the complex administrative policies and procedures that currently exist. Other factors include the need for an effective client feedback mechanism, effective oversight of quality and compliance, and the availability of surge and other support in situations of high demand, complexity and urgency.

38. To address these challenges, the Secretariat has already taken steps within the existing structure to improve human resources management. For example, a full review of the entire human resources regulatory framework, including the Staff Regulations and Rules, administrative instructions, bulletins and circulars, is under way. A simplified framework will ensure greater consistency and accountability in the application of human resources policies. An integrated approach to strategic workforce planning has also been developed and is being piloted. These issues are further elaborated in the report of the Secretary-General on the global human resources strategy 2019–2021: building a more effective, transparent and accountable United Nations (A/73/378).

39. The management reform draws from lessons learned from the restructuring of the Department of Peacekeeping Operations and the establishment of the Department of Field Support in 2007, which was intended to improve the support to peacekeeping operations at a time when the scale and complexity of mandates were growing. Key challenges identified at the time by the Secretariat and oversight bodies such as OIOS included the lack of sufficient focus on support issues by the Department of Peacekeeping Operations given its broad span of control, which previously included substantive and support responsibilities, issues related to the delegation of authority and the alignment of authority with responsibility and resources, and rigid rules and procedures that did not correspond to the realities and requirements of peacekeeping operations.

40. The more than 10 years of experience with the Department of Field Support have shown that an operationally focused department can significantly improve the ability of the Organization to deliver in challenging environments, as illustrated through the establishment of missions in locations such as Libya, Mali, Somalia and South Sudan, as well as the United Nations Mission for Ebola Emergency Response. However, it also illustrates the limits of what is possible when structural changes are not also accompanied by changes to the delegation of authority and revisions to the policy framework. These challenges are reflected in observations by the oversight bodies, including the recommendations from audits conducted in 2015 of the delegation of human resources management authority by the Department of Field Support and the Field Personnel Specialist Support Service in the Field Personnel Division of the Department of Field Support.

# VI. Conclusion

41. The current human resources management framework has consistently been identified by managers across the Secretariat as a major impediment to effective programme delivery. Previous attempts to improve human resources management in the Secretariat have not achieved the desired results, as policy changes alone cannot address the many aspects of the existing challenges. The management reform recognizes that there are underlying structural problems from which many of the current challenges stem. Ensuring that the Organization is able to effectively and accountably deliver programmes and implement its mandates requires not only that entities across the Secretariat are empowered, but also that they are adequately and effectively supported in both the strategic and operational aspects of human resources management. The Secretary-General is convinced that the structure presented in his report on implementing a new management architecture for improved effectiveness and strengthened accountability achieves this by establishing a dedicated structure for strategic human resources functions and a dedicated structure for operational functions, both of which will service all entities across the Secretariat. This separation of functions ensures that there is no competition for attention and resources between the two sets of functions. Moreover, it takes into account the different mindsets required to effectively perform these two sets of functions, allowing one to focus on ensuring alignment between talent and the achievement of the Organization's objectives and the other to focus on achieving excellence in service delivery. Coordination between these two structures will be ensured through a senior management committee and their activities will be informed by feedback received through the Management Client Board.

42. Altogether, this dual structure will ensure a unified approach across the Secretariat for human resources, optimizing the distribution of functions and avoiding duplication. A single consolidated structure for human resources activities would not be able to meet these objectives or address the challenges that are felt by staff and managers across the Secretariat on a daily basis and that have been repeatedly highlighted by the oversight bodies. A major change management process that does not effectively address the structural aspects of the current challenges faced by the Secretariat in the area of human resources management would amount to a significant missed opportunity by the Organization to help to address a perennial pain point that undermines its ability to effectively and accountably implement its mandates.

# VII. Action to be taken by the General Assembly

43. **The General Assembly is requested to take note of the present report.**